IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 473

JOHN H. BINGLER, District Director of Internal Revenue, PETITIONER

vs.

RICHARD E. JOHNSON, et al.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

INDEX

	Page
Docket Entries	1
Transcript of Proceedings before Hon. Rabe F. Marsh, U.S. District Judge, and a jury, commencing November 21, 1966	5
Colloquy between the Court and counsel	6
Stipulation of parties read by the counsel	6
Testimony of Martin L. Pomerantz	10
Testimony of Richard E. Johnson	24
Testimony of Dr. Gerald T. Horne	38
Testimony of Richard A. Wolfe	43
Testimony of Campbell C. Yates	50
Defendant's motion for a directed verdict	56
Motion denied by the Court	56
Testimony of Clyde E. Vogely, Jr.	57
Testimony of William A. Quinn	60
Testimony of Orval A. Redhair	67
Testimony of William F. Maher	69
Testimony of Martin A. Daugherty	70
Testimony of John R. Van Horn	80

Page

Defendant's motion for a directed verdict renewed; denied by the Court 83
Testimony of William A. Quinn 83
Testimony of Richard E. Johnson 84
Defendant's motion for a directed verdict renewed 85
Colloquy between the Court and counsel 85
Charge of the Court 86
Colloquy between the Court and counsel 96
The jury retired for deliberation 99
The jury returned with a verdict 99
Plaintiffs' Exhibit No. 2 99
Defendant's Exhibit No. 1 109
Defendant's Exhibit No. 3 110
Judgment of the District Court 111
Plaintiffs' motion for a new trial 113
Opinion and order of the District Court denying Plaintiffs' motion for a new trial 116
Opinion of the Court of Appeals for the Third Circuit 120
Judgment of the Court of Appeals for the Third Circuit 130
Order of the Supreme Court of the United States granting a writ of certiorari 131

CIVIL DOCKET

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

Judge Marsh JURY

Jury demand date:

RICHARD E. JOHNSON and BEVERLY P. JOHNSON, his wife, and MARTIN L. POMERANTZ and PHYLLIS L. POMERANTZ, his wife, and RICHARD A. WOLFE and ANNE F. WOLFE, his wife

v.

JOHN H. BINGLER, Dist. Director of Int. Rev.

ATTORNEYS

For plaintiff:
Dougherty, Larrimer & Lee
901 Grant Bldg. (19)

For defendant:
U. S. Attorney
633 U. S. Post Office &
Court House (19)

Docket Entries

1965

Sept. 22—Complaint filed.

Sept. 22—Summons issued.

Oct. 25—Summons returned served 10-19-65 on Dist. Director of Int. Rev. & U.S. Atty.; served on Atty. Gen. by certified mail, return receipt dated 10-13-65.

Dec. 3—Amended Complaint filed by pltfs. with Order entered allowing same to be filed and amending caption. (Marsh, J.)

Dec. 13—Answer to pltfs' Amendment to Complaint filed.

Dec. 15—Answer filed by deft. on 12/3/65 and Order dated 12/15/65 entered thereon granting leave to file same as of 12/3/65. (Marsh, J.)

Dec. 15—Order entered fixing pretrial procedure. (Marsh, J.)

1966

Jan. 7—Notice of taking the depositions of Richard E. Johnson, Martin L. Pomerantz and Richard A. Wolfe, filed by deft.

Feb. 14—Pretrial Statement filed by pltfs.

Feb. 17—Depositions of Richard E. Johnson, Martin L. Pomerantz and Richard A. Wolfe filed.

Feb. 21—Deft's pre-trial stmt filed.

Mar. 25—Pretrial Stipulation of counsel filed.

April 20—Deft's. requested special interrogatories filed and deft's. Alternative Requested Special Interrogatories filed.

April 20—Deft's. requested Instructions to the Jury filed by deft.

April 25—Motion filed by deft. and Order entered directing that the pretrial conference scheduled for 4-26-66 at 2:30 P.M. is hereby continued to a date of which counsel will be notified by the Court. (Marsh, J.)

Sept. 14—Transcript re: pretrial conference held 9/13/66 before Marsh, J. filed. (Rep. Blaney Cook)

Sept. 14—Pretrial held 9/13/66 before Marsh, J. and concluded. Hearing memo filed. (Rep. Blaney Cook)

Sept. 14—Pretrial order dated 9/13/66; case assigned to Master list for trial by Marsh, J. (Marsh, J.)

Nov. 18—Deft's list of exhibits filed.

Nov. 18—Deft's final listing of witnesses and exhibits filed.

Nov. 21—Stipulation in re number of jurors filed.

Nov. 21—Trial opens before Marsh, J. and a Jury.

Nov. 22—Trial continues.

Nov. 23—Trial continues.

Nov. 28—Trial continues. and concludes. Trial memo filed. (Rep. B. Cook)

Nov. 28—Verdict answered by the jury and filed. Verdict sheet filed. (in favor of deft) (Mr. Michael Arkin, Esq. counsel for deft. to make up judgment-from Washington)

Nov. 28—Order re meal and hotel accommodations for jurors filed. (Marsh, J.)

Nov. 29—Pltf's points for charge filed.

Nov. 29—Pltf's additional request for charge filed.

Dec. 2—Judgment order entered by the court in favor of deft., together with costs, and dismissing complaint with prejudice (Marsh, J.)

Dec. 5—Pursuant to Judgment order entered, judgment is hereby entered in favor of deft, and against pltf., together with costs, and complaint is hereby dismissed with prejudice. James H. Wallace, Jr., Clerk

Dec. 5—Notice mailed.

Dec. 2—Motion for New Trial filed by pltfs.

Dec. 6—Order entered directing that movants file brief on or before 2-3-67 & respondent shall file brief on or before 2-13-67 & further ordered that argument on motion for new trial is fixed for 2-16-67 at 3:00 P.M. Unless specifically requested in writing, no court reporter shall be present at this argument. (Marsh, J.)

Dec. 6—Bill of costs in the amount of $43.28 filed by U. S. (deft.)

1967

Jan. 5—Letters mailed counsel of record advising that costs will be taxed by the Clerk 1/11/67.

Jan. 9—Transcript filed re: Jury trial held at Pgh. commencing 11-21-66 before Marsh, J. and a Jury. (Rep. B. Cook) (Volume 3, Judge's Charge on 11-28-66)

Jan. 11—Costs in the amount of $43.28 taxed by the Clerk against the pltf. James H. Wallace, Jr. Clerk

Jan. 27—Satisfaction of Judgment filed by U.S.A.

Jan. 27—Pursuant to Satisfaction filed, Judgment entered in above entitled action is hereby marked satisfied.
James H. Wallace, Jr., Clerk

Feb. 16—Hearing on Motion for New Trial begun and concluded C.A.V. before Marsh, J. Hearing memo filed. (Rep. none)

March 6—Transcript of trial held before Marsh, J. (Rep: B. Cook) (Vol. 1)

March 6—Transcript of trial held before Marsh, J. (Rep: B. Cook) (Vol. 2)

July 3—Opinion filed and Order entered directing that the pltfs' motion for a new trial is denied. (Marsh, J.)

July 26—Notice of Appeal filed by pltfs.

July 26—Copy of Notice of Appeal mailed U. S. Court of Appeals; letters to counsel of record and Judges Marsh and Gourley. (Pltfs served U. S. Atty. with a copy)

Aug. 1—Bond for Costs on Appeal in the amt of $250.00 posted by plts. (Surety-Golen Falls Ins. Co.)

[1] IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION 65-1033

RICHARD E. JOHNSON and BEVERLY JOHNSON, his wife, and MARTIN L. POMERANTZ and PHYLISS POMERANTZ, his wife, and RICHARD A. WOLFE and ANNE F. WOLFE, his wife, *Plaintiffs:*

v.

JOHN H. BINGLER, District Director of Internal Revenue, *Defendant:*

Transcript of Proceedings

Civil Jury Trial, U. S. District Court, Pittsburgh, Pa., Commencing November 21, 1966.

BEFORE: HON RABE F. MARSH, U. S. District Judge, and a jury.

• • •

[2] INDEX

Witness	Direct	Cross	Dedirect	Recross
Martin L. Pomerantz	34	55	71	73
Richard E. Johnson	75	112	128	
Dr. Gerald T. Horne	130	148	155	
Richard A. Wolfe	157	167	174	

[3] PROCEEDINGS

Monday Morning,
November 21, 1966.

(A jury of twelve members was duly empaneled.)

* * *

[14]

* * *

Mr. Larrimer: Your Honor, I might say for the record at this time that I have no objection to that as an accurate statement of the regulations as they exist. As a matter of a charge to the jury, I would take exception to any portion of that relating to compensation for services performed, either past, present or future, unless there is produced at the trial evidence of those facts to which that portion of the charge could relate.

The Court: Do you expect to produce evidence to that effect?

Mr. Arkin: Yes, Your Honor, I do.

The Court: I was sure he did. He equates these scholarships with compensation to Westinghouse. I don't know whether it is past, present or future, or all three of them.

Mr. Arkin: Neither do I.

The Court: Nobody knows, but that great jury will be able to determine that for us.

* * *

[28] The Court:

* * *

It is stipulated between the parties that this is a civil action for the refund of income taxes alleged to have been erroneously assessed and collected on behalf of the following named taxpayers for the taxable years indicated, and in the following amounts, plus interest according to law.

The Plaintiff Richard E. Johnson and Beverly P. Johnson, amount $395 for the year 1960 and $599.82 for the year 1961.

Martin L. Pomerantz and Phyllis L. Pomerantz,
[29] the amount $276.68 for the year 1961 and $312.10 for the year 1962.

Richard A. Wolfe and Anne F. Wolfe, $985.31 for the year 1960 and $362.24 for the year 1961.

It was further stipulated by the parties that the Plaintiffs Johnson—Mr. and Mrs. Johnson—timely filed joint income tax returns for the years 1960 and 1961.

The Plaintiffs Johnson filed amended tax returns on April 4, 1963 seeking refunds of $395 for 1960 and $599.82 for 1961.

On September 27, 1963, the District Director of Internal Revenue issued statutory notices of disallowance denying the Plaintiffs' claims for refund.

The Plaintiffs Pomerantz timely filed joint income tax returns for the years 1961 and 1962.

The Plaintiffs Pomerantz filed amended tax returns seeking refunds of $276.68 for 1961 and $312.10 for 1962.

On March 29, 1965 the District Director of Internal Revenue issued statutory notices of disallowance denying Plaintiffs' claims for refund.

This suit—the one you are trying—was filed on September 22, 1965, I believe, on behalf of Johnson and Pomerantz.

The Plaintiffs Wolfe timely filed joint income
[30] tax returns for the years 1960 and 1961. The Plaintiffs Wolfe filed amended tax returns on April 24, 1963 seeking refunds of $985.31 for 1960 and $362.24 for 1961.

On December 20, 1963, the District Director of Internal Revenue issued statutory notices of disallowance denying Plaintiffs' claims for refund.

The Plaintiffs Wolfe were made parties Plaintiff in this action which you are trying by an amended complaint filed in this court on December 3, 1965.

It was further stipulated by the parties that the Plaintiff Beverly F. Johnson is named as a Plaintiff only because there was a joint income tax return for the years involved. As you will recall, Beverly is Mr. Johnson's wife.

Richard E. Johnson has been employed by Westinghouse Electric Corporation since 1956. Richard E. Johnson was granted an educational leave for a period of nine months from October 1, 1960 to June 30, 1961.

Richard E. Johnson obtained a Doctor of Philosophy degree, commonly called a PhD degree, in metallurgical engineering from Carnegie Institute of Technology in 1965.

The educational leave was taken pursuant to the Westinghouse Bettis Fellowship and Doctoral Program.

While on educational leave, Westinghouse paid Richard E. Johnson $1,890 in 1960 and $3,780 in 1961.

[31] It was further stipulated and agreed by the parties that the Plaintiff Phyllis L. Pomerantz is named as a Plaintiff only because there was a joint income tax return filed for the years involved. Phyllis Pomerantz is the wife of Mr. Martin Pomerantz.

Martin L. Pomerantz has been employed by Westinghouse Electric Corporation since 1957. Martin L. Pomerantz was granted an educational leave for a period of nine months from November 1, 1961 to July 31, 1962.

Martin L. Pomerantz obtained a Doctor of Philosophy degree in Mechanical Engineering from the University of Pittsburgh in 1962. The educational leave was taken pursuant to the Westinghouse Bettis Fellowship and Doctoral Program.

While on educational leave, Westinghouse paid Martin L. Pomerantz $1,260 in 1961 and $4,410 in 1962.

It was further stipulated and agreed by the parties that the Plaintiff Anne F. Wolfe is named as a Plaintiff only because there was a joint income tax return filed for the years involved. Anne Wolfe is the wife of Richard Wolfe.

Richard A. Wolfe was employed by Westinghouse Electric Corporation in 1952. Richard A. Wolfe was granted an educational leave for a period of twelve months from March 1, 1960 to February 28, 1961.

[32] Richard A. Wolfe obtained a Doctor of Philosophy degree in Mechanical Engineering from Carnegie Institute of Technology in 1963. The educational leave was taken pursuant to the Westinghouse Bettis Fellowship and Doctoral Program.

While on educational leave, Westinghouse paid Richard A. Wolfe $8,052.40 in 1960 and $1,646.50 in 1961.

It was further stipulated and agreed by the parties as follows. Doctor Johnson—that is Richard E. Johnson—signed an employment agreement by which he agreed that at the end of the educational leave he would assume such duties commensurate with his education and experience as may be assigned to him by Westinghouse, and that he would thereafter continue in the employ of Westinghouse

for at least two calendar years from the date he assumed those duties, and at a rate of salary commensurate with the duties assigned.

Doctor Pomerantz—that is Martin L. Pomerantz—signed an employment agreement by which he agreed that at the end of the educational leave he would assume such duties commensurate with his education and experience as may be assigned to him by Westinghouse, and that he would thereafter continue in the employ of Westinghouse for at least two calendar years from the date he assumed those duties, and at a rate of salary commensurate with the duties assigned.

Doctor Wolfe—that is Richard A. Wolfe—did not sign such a written agreement, but he was informed by Westinghouse that he was expected to return to the
[33] employ of Westinghouse for a period at least equivalent to his period of educational leave.

It was further stipulated and agreed by the parties that the Bettis Fellowship and Doctoral Programs are available only to selected employees of the Bettis Atomic Power Laboratory of the Westinghouse Electric Corporation.

Participants in the program may elect to pursue the degree of Doctor of Philosophy in the field of mechanical, electrical, chemical or metallurgical engineering, or physics or mathematics, at either the University of Pittsburgh or the Carnegie Institute of Technology.

In obtaining the Doctor of Philosophy degree under this program, the participants must satisfy the requirements of the University of Pittsburgh or the Carnegie Institute of Technology for the granting of such degree in the same manner as other candidates for that degree.

The Carnegie Institute of Technology and the University of Pittsburgh are educational institutions as defined by a certain section of the Internal Revenue Code of 1954.

• • •

[34] MARTIN L. POMERANTZ,

called as a witness in behalf of the Plaintiffs and being duly sworn, testified as follows:

Direct Examination

By Mr. Larrimer:

Q. You are one of the Plaintiffs in this case, Mr. Pomerantz? A. Yes, I am.

Q. Where do you live now? A. 5147 Leona Drive, Pittsburgh, Pennsylvania.

Q. Do you have a family? A. Yes, I do.

Q. How many children? A. Three children.

Q. What is your present employment? A. I am a consulting engineer in private practice.

Q. How long have you been in private practice? A. For fourteen months.

Q. What is your beginning date of employment at Westinghouse? When did you start at Westinghouse? A. July 1957.

Q. Had you been employed prior to this time? A. A summer job in 1956 with the Bethlehem Steel Company for one month.

[35] Q. And, what was your education, Mr. Pomerantz, prior to your employment with Westinghouse in 1957? A. I had a Master's degree in Mechanical Engineering and a Bachelor's degree in Marine Engineering.

Q. And, where did you secure your Master's degree? A. From the Stevens Institute of Technology in Hoboken, New Jersey.

Q. And, where did you secure your Bachelor of Science degree? A. From the United States Merchant Marine Academy in Kings Point, New York.

Q. Now, would you tell the jury, Mr. Pomerantz, how you got interested in this Westinghouse Doctoral Program? A. While I was at the Stevens Institute of Technology, near the end of my senior year, I was aware of several representatives of several industrial firms coming onto the campus to interview prospective employees.

And, a friend of mine told me that the Westinghouse Electric Corporation in Pittsburgh had a program where

it was possible for an employee to go to school part time while he was working at the plant.

That is how I became aware of the program.

Q. Did you then seek employment with Westinghouse? A. Yes, I did. I saw the interviewers on the campus, and they arranged for me to go out to the Westinghouse Bettis plant for a one-day visit.

[36] Q. And, what occurred on this one-day visit?

A. While I was at the Westinghouse Bettis plant, I was interviewed by several members working at Westinghouse, where they would ask me questions about what type of engineering I was interested in. And, I would ask them questions about what type of work was being done at Bettis. I gave them my academic records.

A few people asked my why I wanted to continue my education. I told they why I thought it was important in this day for engineers to keep abreast of modern technology. And, that concluded the day.

Q. What was your academic record at Stevens Institute? A. I believe I received about ten A's and two B's, and I was an honor student at the United States Merchant Marine Academy.

Q. Were you then offered employment at Westinghouse? A. Yes. I was offered employment at Westinghouse, and I accepted.

Q. In what capacity were you employed? A. I was hired in a category called associate engineering.

Q. And, what branch of Westinghouse? A. I worked in a section which was then designing a nuclear reactor to be installed at Shippingport, Pennsylvania. I

[37] was in what is called the heat transfer and fluid flow section.

Q. Is this part of Bettis? A. Yes. This was a section in the Bettis Atomic Power Laboratory.

Q. And, what was the nature of your work? What was the nature of your work if you are free to state it at this time, or was your work classified? A. Oh, no. I was in a project that was not classified.

This project—or the purpose of the project—was to design and have constructed a nuclear reactor to be installed in the Shippingport plant which is nearby here owned by the Duquesne Light Company for the generation

of electricity. And, my duties were to design certain portions of the nuclear reactor.

Q. Would you call that developmental research? A. I would call it developmental research, yes. It was research and a developmental type of activity.

Q. Mr. Pomerantz, you were, of course, aware of the Doctoral Program at Westinghouse at the time when you began your employment? A. Yes, I was.

Q. When did you enroll under the program? A. At the same time that I began employment at Bettis, I was told that I would have the program offered to me.

[38] And, I entered Westinghouse employment in July, and I started school at the University of Pittsburgh on the program in September of that year.

Q. Then, in order to start school at the University of Pittsburgh, what did you have to do? A. I had to go through the enrollment procedure outlined in the catalogue published by the University of Pittsburgh. I had to obtain my records from my previous schooling and send them to the University of Pittsburgh.

And then, these records had to be accepted by the people in the mechanical engineering department. That is where I studied at the University. And then, once that was accepted, I was accepted as a student.

Q. From September then, how long did your studies—as distinguished from research—continue at the University of Pittsburgh? A. I took formal courses at the University of Pittsburgh from September 1957 to, I would say, January 1960—no, that was 1961, rather.

And then, a few months later, which would be about October or November of 1961, I started on my thesis work. So, the course work took approximately four years.

Q. Now, in 1957 when you first began at the University of Pittsburgh, would you tell the jury what you did as between the University of Pittsburgh and your

[39] employment at Westinghouse, time-wise? A. Well, during that period of time, I would be going to school and taking two or three courses, and during a four-day work week I would be working at Westinghouse designing these parts of the nuclear reactor for Shippingport.

• • •

[40] Q. Were these courses that you selected to take at the University of Pittsburgh the regular curriculum at the University? A. Yes.

Q. And then, this continued—this course of study or classroom study—until what year? A. The formal course study ended in 1961.

Q. And, during this period, you were working four days a week, you said? A. Yes.

Q. Were you being paid by Westinghouse? A. Yes, I was.

Q. And, of course, you paid taxes on that salary? A. Yes, I did.

• • •

Q. Now, during this four-year period, did you have to meet certain scholastic requirements? A. Yes. There were scholastic requirements. In order to stay on the program, the student had to be above average.

I don't recall the exact average that he had to have, but it was higher than one would normally need.

[41] Q. This is a requirement imposed by whom? A. This requirement was imposed by Westinghouse.

Q. And, this was a requirement that your grades had to be of a certain stature? A. That is right.

Q. Either a B or an A or a B-plus or something like that? A. Yes.

• • •

Q. Mr. Pomerantz, I show you what has been marked Plaintiffs' Exhibit 1. Would you just tell the jury generally what that is? A. This is a list of general rules and regulations and the purpose of the Westinghouse Bettis Fellowsihp Program. It was printed in 1957 on December 18th.

It is a set of rules put out to inform the people on the program and other people what the program consisted of.

Q. I show you now Plaintiffs' Exhibit 2 and ask you to tell the Court and jury what that is? A. This is

[42] another set of rules about the Westinghouse Bettis Fellowship Program, published internally in Westinghouse.

It is dated July 21, 1960, which happens to be my birthday.

But, it is another set of rules. They had revised the old set and put in a new set of rules.

Mr. Larrimer: If the Court please, it has been stipulated that Plaintiffs' Exhibits 1 and 2 may be offered in evidence. And, I so offer them.

Mr. Arkin: No objection.

The Court: Let Exhibits 1 and 2 be admitted in evidence.

By Mr. Larrimer:

Q. Mr. Pomerantz, as a part of your participation in this program, were you also required by Westinghouse to agree to employment subsequent to your completion of your degree work? A. I signed an agreement which stated that after my leave period, I would come back into the employ of Westinghouse for a period of at least two years after I returned.

Q. And, did you so comply? A. Yes.

Q. Now, let's get into the program itself. You were employed as an associate engineer, I believe, in 1957?

[43] A. Yes.

Q. Is that a title which carried with it a certain rate of compensation at Westinghouse? A. That is correct. For each title or type of engineer, they have a range of salary, and it is set up so that a person's salary would then be between a lower and an upper limit in that range. Each title defines a range of salary.

Q. Were there other associate engineers at Westinghouse receiving the same salary as you? A. Yes.

Q. And did all of these associate engineers participate in this program? A. No.

Q. So that, you received the same compensation as the other associate engineers? A. As far as I know, I did.

Q. Now, when you went on the leave program, in order to go on this program what requirements did you have to meet insofar as the University was concerned? A. Well, as far as the University was concerned, I had to have passed my qualifying examinations, which I did.

Q. Which was what? A. These are examinations in my skills and in engineering. I was tested in five

[44] categories of engineering. And, I had to receive a passing grade in all five categories.

Q. What were those five categories? A. They were heat transfer, fluid flow, thermodynamics, stress analysis, and vibrations.

I also had to satisfy the language requirements, which meant I had to be proficient in a foreign language. And, I passed the examination for that.

Also, I had to have a thesis topic which was acceptable to the faculty. And, previous to going on leave, I took a course which was designed to search out a thesis topic.

And, the procedure for the student—which I was at that time—is to look through the literature of the specialty of engineering in which I was interested, and to try to find where there were some problems that might be interesting.

And, I would work very closely with a member of the faculty at the University of Pittsburgh, and he would guide me, and we would come up with a topic that he felt was acceptable and I felt I would be interested in working on.

And, as soon as these met his approval, he had agreed to be my thesis advisor. This was the final requirement.

Q. Who was your thesis advisor at Pitt? A. My thesis advisor for the major portion of the thesis was
[45] Professor Yates.

Q. Do you recall, Mr. Pomerantz, what salary you were receiving immediately prior to the time you went on your leave of absence? A. Yes. Before I went on my leave of absence, I was receiving $800 a month salary.

Q. And, what was the amount of the allowance granted to you during your leave of absence, if you recall? A. It was $630 a month.

Q. Was this the amount specified under this Exhibit 2 that you referred to? A. May I just take a look at that? I am not sure whether that was the specific document.

Q. I show you the last paragraph. A. Yes, this is it. It was based on whether I was married and how many children I had.

Q. In other words, the $630 was determined in what manner under this outline? A. It was determined by my family status rather than anything that I had done before or what I was working on.

Q. Was $630 the maximum amount? A. Yes.

Q. Now, you testified that you discussed a thesis topic with your faculty advisor? A. Yes.

[46] Q. What was the topic that you ultimately decided to explore? A. The name of the topic was the effect of increased gravity on film boiling.

This is a heat transfer problem. The area of film boiling—and actually you may be familiar with it— is similar to dropping some water on a hot frying pan. Usually a cook tests whether the frying pan is hot enough in this manner.

If the bubble dances around on the frying pan, that type of boiling is called film boiling. And, this was the topic that I picked in conjunction with my thesis advisor.

Q. Would you tell the jury how you came about to select this particular topic? A. Well, I selected this topic after looking into the literature in heat transfer and fluid flow. I was interested in heat transfer and fluid flow, and I had some friends who had done some research at the University of Pittsburgh.

And, after looking at the literature, I saw that there was no information about the effect of increased gravity. And, by increased gravity, this would be something, for example, if someone was in an automobile and it was accelerated rapidly, that you would be pushed back into your seat. Well, that is due to acceleration or increased gravity.

[47]

Q. Mr. Pomerantz, did Westinghouse tell you to study this particular topic? A. No. I had no contact whatsoever with my supervisory people at Westinghouse while I was picking the topic.

Q. Who claimed ownership of the selection of this topic? A. Well, I claim it.

Q. You claim it. Was there any effort at all on the part of Westinghouse to compel you to select a particular topic? A. No, there was none whatsoever. No one came to me or told me or implied that I should pick a topic that they would be interested in. I was entirely on my own.

Q. When you selected this topic, did you then submit it to your faculty advisor or was he aware of it, or was the selection process a joint process? A. It was a joint process. Actually, I had to make up a report describing what I wanted to study and why, and he helped me with the report. And then, he approved the final report.

[48] Q. This was a written report? A. A written report to my faculty advisor, yes.

Q. And, what did this report report on? A. It stated where I thought there was a need for more knowledge, or

extension of knowledge, how I proposed to go about getting the information, how I proposed to solve the problem, and in essence why I wanted to study this particular topic.

Q. Did the report also contain a suggested requirement as far as equipment is concerned? A. Well, the report did contain requirements for instrumentation and certain pieces of equipment. I needed some test equipment for my thesis.

Q. To your knowledge, did this thesis topic solve any problem that was then confronting Westinghouse at their Bettis plant? A. None whatsoever to my knowledge. In fact, it was a type of boiling which at that time Westinghouse at Bettis would want to stay away from, because it meant they would have been in trouble if they had this happening in one of their reactors.

Q. Now, was there any notification given to Westinghouse of this particular topic that you chose? A. Well, yes. Before going on leave, I had to inform the people administering the program what I was going
[49] to be studying during my time off. And, I informed them, and probably in a written communication.

• • •

[50] Q. Where did this take place? A. This took place in a building about a mile from the University of Pittsburgh campus. It was owned by the University of Pittsburgh.

• • •

[51]

• • • •

Q. How long did you conduct this type of research—for what period of time—when you started your leave? A. For nine to ten months. It took me maybe a month or two to build the experimental apparatus with the equipment I was given, and it took me a long period of time to get the information that I wanted.

The total leave period was about nine or ten months.

Q. And then, you had to submit a written report, is that right? A. Yes.

Q. Were you writing this report at this time? A. I had started writing it. I had an outline before I started so I would know what information I needed. And then, I

started seriously writing the report in about my eighth month of the leave.

I continued writing it throughout that time and then went back to Westinghouse. And then, at night I would go home and work on the thesis.

And, I kept writing on it until about, I guess
[52] it was November of that year. That would be about two months after I had been back at Westinghouse before I had finally put it together and submitted it for approval to the University of Pittsburgh.

Q. Now, to whom would you submit this report? This is called a thesis report? A. Yes. A thesis or dissertation. And, I submitted it to my advisor. He had formed a committee of about himself and four other professors, and they each read the dissertation or thesis, and they sent me back any of their compliments or suggestions.

• • •

[53]

• • •

Q. During this nine-month period, what was your contact if any with Westinghouse? A. Well, there was no official contact with the company or the plant. Some friends of mine who worked there I would see socially.

Q. Did you perform any duties for Westinghouse? A. No, none whatsoever.

Q. Did you have any regular employment duty during this nine-month period? A. No, nothing, no obligation at all. I didn't have to show up at the plant until my leave was finished.

One thing I did have to do, and that was periodically to send in progress reports to the people at Westinghouse who administered the program. They wanted these progress reports to make sure that I was making progress, just as my thesis advisor wanted.

Q. And, what would a progress report consist of? A. Well, it might be a one-page report which would say that during the past three months I collected data or started an
outline, and during the next three months I expect
[54] to finish the first phase. That would be it, so that they would know that I was making technical progress.

Q. Now, you stated that this thesis topic, after you have successfully defended it, is then published and available for inspection? A. Yes. It is published in a sense that the University binds a copy and places it on their library shelves and indexes it so that anyone who wants to read it can read it.

In addition, I also chose to take my thesis and publish what is called a technical paper. I belong to a technical professional society, and I feel that the information that I obtained during this thesis would be of interest to engineers throughout the whole country.

So, I submitted it to them for publication. They accepted it and it was published in the national magazine that goes to engineers.

And, I also presented it at a technical meeting where engineers from all companies and all industries would be present. So that, everyone has access to the information now.

Q. Would this information be of any more value to Westinghouse than it would be to General Electric or some other company? A. No, it wouldn't be of any special value to Westinghouse. It is available to anyone. There is no special value that it has to Westinghouse.

[55] • • •

Cross-Examination

By Mr. Arkin:

• • •

[56]

• • •

Q. We were discussing the area in which you worked in Bettis prior to your educational leave. A. Yes.

Q. Would you describe that? A. The work that I did was to design a nuclear fuel element specifically. This was the most important category.

Q. Now, how does that relate to this heat transfer and fluid flow? A. You mean why was it in this section?

Q. I would like to know what the area is about. A. Well, the nuclear fuel produces heat and the nuclear reactor has water going through it to carry the heat away. And,

in order to calculate how hot the fuel element is,
[57] one has to know how to determine the temperature of the fuel element. That is the heat transfer portion.

And, the fluid flow is to determine how the water goes by.

Q. Well now, what kind of work does Bettis do—that is the Bettis Laboratory—in general? A. They design nuclear reactors for the Atomic Energy Commission.

Q. Now, your thesis topic, was that not also in the heat transfer field? A. In a broad general sense, yes.

• • •

[58]

• • •

Q. Now, were you not urged to consult with the supervisors of the Bettis project regarding your choice of a thesis topic? A. No one asked me to do that.

Q. Is there not a statement in the statement of purpose and general regulations which suggests that participants discuss with their Bettis supervisors the topics that they intend to study? A. (Pause)

Q. On page 4, paragraph 3, if you are on the same one I am on—

The Court: What are you on? Nobody else knows.

Mr. Arkin: It is Plaintiffs' Exhibit 2, page 4, paragraph 3.

The Witness: It says, "Each participant is urged to explore fully the possibility of conducting his doctoral dissertation in an area of technical interest to Bettis".

• • •

[59]

• • •

Q. On page 5, there is a statement regarding educational leave and the AEC relationship. Were you aware that your educational leave had to be approved by the Atomic Energy Commission? A. Yes.

• • •

[60]

• • •

Q. Were you also covered by the employees' pension plan while you were on educational leave? A. I don't recall.

[61] Q. Were you covered by any employees' plan for medical insurance, like Blue Cross? A. Yes, I think so.

Q. Do you know whether or not you were eligible for stock options pursuant to the Westinghouse plans? A. I don't know.

• • •

Q. I realize that. What I am asking is whether or not Westinghouse restricted your choice of univer-

[62] sities for the entire program? A. I think so, yes. I think I could only go to the University of Pittsburgh for mechanical engineering.

If I had wanted to choose another subject, I could have gone to Carnegie Tech.

Q. Could you have chosen a subject such as philosophy or psychology? A. No. The subjects were limited to what was contained in a paper that someone read earlier in this courtroom. I don't recall whether it was in the opening argument, or what.

But, there were certain restrictions to engineering. Of course, engineering is a very broad field, containing mathematics, physics, metallurgy and a few other things, and which they are also broad fields which one can study. There are many things in engineering.

Q. Are these all fields from which the Bettis Atomic Power Laboratory draws its personnel, or from which its personnel are drawn? A. Yes. Well, the subjects I have outlined cover almost everything in technology.

Q. You mentioned that you signed an employment agreement? A. That is correct.

• • •

[63]

• • •

Q. I hand you Defendant's Exhibit 1 and ask you to look it over and look at your signature.

• • •

Q. Is it your signature? A. It looks like it. I would say yes, that it is my signature.

Q. Is that an accurate, true and correct copy of the original employment agreement that you signed? A. To the best of my knowledge, it is.

Mr. Arkin: Your Honor, we move Exhibit No. 1 into evidence.

Mr. Larrimer: No objection.

The Court: Let it be admitted.

By Mr. Arkin:

Q. Now, that agreement provided that you would work for Westinghouse for two full calendar years after you completed your educational leave, is that not so? A. Two calendar years from the date I assumed the duties that they assigned me, yes.

[66]

• • •

Q. Now, when you went to Bettis for that interview, were you being interviewed for a job only or for the program also?

• • •

Q. Was your purpose in going to Bettis to be interviewed for both? A. Yes.

Q. Is it fair to say that you were interested not only in a job but also in a job which would allow you to continue your education? A. Yes.

• • •

[67]

• • •

Q. When you began your leave period, were you written a letter explaining the requirements of the leave period and explaining these reports that you were supposd to forward to Westinghouse? A. I don't remember. I probably did get some notice. Otherwise, I wouldn't have filed the reports and the things like that.

But, I don't exactly recall getting something. There is something spelled out in these regulations.

Q. May I hand you a letter to refresh your memory, perhaps? A. Yes. This looks like a letter that was sent to me and which I received, because it outlines what the progress reports should be.

Q. Did you keep the original of this letter?

[68] A. I don't know. I probably threw it away after I finished the course.

(The document was marked as Defendant's Exhibit 2 for identification.)

By Mr. Arkin:

Q. Now, referring to this letter, to refresh your memory, what were the requirements of the reports that were required? A. It says, "The format of your bi-monthly progress report should be as follows: Major accomplishments since the last report". I am just going to have to abstract these. I will leave out what I don't think is important.

"Deficiencies affecting your progress that are beyond your immediate control; identification and statement of your problems within the scope of your control and the recommended or planned solutions, together with a brief analysis of why the solution was selected;

"Laboratory or University actions that adversely affect your operations; general suggestions for improvement which are not within your area of control."

That covers what was supposed to be in the bi-monthly report.

• • •

[70]

• • •

Q. Now, you began your leave in 1961, didn't you? A. That is correct.

Q. When you filed your tax return for 1961 in
[71] 1962, how did you report these payments? A. I reported them. They were included in my W-2 form.

Q. Did you report them as wages or salary? A. Yes.

Mr. Arkin: No further questions, Your Honor.

Redirect Examination

By Mr. Larrimer:

Q. And, you then filed a claim for refund? A. Yes, I did.

• • •

[72]

• • •

Q. Now, Mr. Pomerantz, it has been brought out that you signed an employment agreement by which you would return to Westinghouse at the end of your educational leave? A. Yes.

Q. Now, did you in fact return to Westinghouse? A. Yes, I did.

Q. Did you go to the same job that you had before the leave? A. No. I went to a completely different aspect of engineering.

Q. You did not go back to the same job? A. No, I did not go back to the same job. I was in a different project and doing a different type of work.

Q. Then, how did you get to this new job? By what process? A. Well, it was almost as if I was a new employee coming in for a job. I asked for a certain type of assignment, and they said that they had openings and they would see if they could give it to me.

And then, a few weeks later, they told me I
[73] could have this position.

Q. And, what was the rate of compensation for this new job? A. I believe it was slightly higher than what I had. It was $830 a month, I think, as the pay.

Q. What was your title? A. My title was engineer.

Q. Engineer? A. Yes. That is higher than associate engineer.

Q. And, you were compensated for the work that you did for Westinghouse under this employment agreement? A. Yes. When I returned, I was getting a pay that was approximately what other people who had not been on the were getting for the same type of work with the same type of experience.

• • •

[75]

• • •

RICHARD E. JOHNSON

called as a witness in behalf of the Plaintiffs and being duly sworn, testified as follows:

Direct Examination

By Mr. Larrimer:

Q. Would you state your name? A. Richard E. Johnson, Sr.

Q. Where do you live, Mr. Johnson? A. My full address is 6729 Still Meadow Lane, Cincinnati, Ohio.

Q. And, how long have you lived there? A. Since the first of October. That is a month and a half.

Q. Do you have a family? A. Yes, I do, a wife and six children.

Q. How old are you, Mr. Johnson? A. Thirty-eight.

[76] Q. And, are you employed presently? A. Yes, I am.

Q. By whom? A. The General Electric Company, Flight Propulsion Division, Cincinnati, Ohio.

Q. And, whene did this employment begin? A. June 13th of this year.

Q. 1966? A. 1966, yes.

Q. What was your prior employment? A. I was employed as a senior engineer at the Westinghouse Atomic Power Laboratory, West Mifflin, Pennsylvania.

Q. And, you are one of the Plaintiffs in this case? A. I am, sir.

Q. Now Mr. Johnson, when did your employment with Westinghouse begin? A. In June of 1956.

Q. And, what was your education prior to this time? A. In June of 1956 I received a Bachelor of Science degree in Metallurgical Engineering from Carnegie Institute of Technology.

Q. This was the first degree that you received in engineering? A. Yes, sir, or in anything else.

[77] Q. What was your prior employment? A. It was with United States Steel Corporation in the Homestead District Works.

Q. In what capacity? A. In various capacities throughout the inspection and metallurgical departments in the plant.

Q. Is this where you developed an interest in metallurgy? A. A real and abiding interest, yes.

Q. And, tell us how you became aware of the Doctoral Program with Westinghouse? A. In the spring semester of my senior year at Carnegie Tech, I was asked into the office of Professor Robert Mehl. who was the head of the metallurgical engineering department and also at the same time was the dean of graduate studies at the school.

He asked me if I was going to make application to graduate school. And, said I would love to but I couldn't support my family.

And, after quite some lenthy discussion, he advised me that, although not yet made public, there was to be forthcoming a Fellowship Program with the Westinghouse Atomic Power Laboratory, and suggested that although it might take me more time to get my degree, I might be able to support the family and should look into it.

I said I would be glad to. And then, I believe
[78] he took the initiative and some arrangements were made for me to be interviewed for the program.

Q. Were you then interviewed? A. Yes, sir, I was, in the spring of that year.

Q. And, where did the interview take place? A. At the Westinghouse Bettis plant.

Q. At that time, what was your purpose in seeking the interview or going to the interview? A. It was twofold, to seek employment as an engineer and to seek a position on the Fellowship Program.

Q. Now, in order to get into this program—this Doctoral Program at Westinghouse—was there a scholastic standard you had to meet? A. Yes, sir. I had to be accepted by the graduate school at Carnegie Tech.

• • •

[79] Q. Were you accepted in this program?
[80] A. Yes, I was.

Q. At Westinghouse? A. Yes.

Q. And, when did your enrollment at Carnegie Tech begin? A. In September of 1956.

Q. 1956. And, when did your employment at Westinghouse begin? A. In June of 1956.

Q. June of 1956. Now, you have heard Mr. Pomerantz testify. Did your course of study take any length of time? And, your classroom study I am talking about. A. Yes. I engaged in a program which involved four years of essentially half-time study, which then equipped me to take the qualifying exam of which I spoke.

Q. During this four-year period, Mr. Johnson, what were the subjects or what were the general nature of the subjects that you studied? A. I studied courses which were basically what the department calls physical metallurgy as opposed to process or extracting metallurgy, but with certain extracting metallurgy minors.

I also had courses in mathematics, physics and chemistry. I probably could name them, but I am not sure that that is pertinent.

[81] Q. Were these classroom studies? A. They were, sir.

Q. Did you have textbooks? A. We did, sir.

Q. Were there other students? A. Yes, sir.

Q. Some of whom were not Westinghouse employees? A. Most of whom were not Westinghouse employees.

Q. Were these students regularly enrolled at Carnegie Tech? A. Yes, sir. They were in more than one category. Some were regularly enrolled for individual courses, some as evening school students, and others who were full-time degree candidates.

Q. Now, Mr. Johnson, were you a candidate for a degree? A. Yes, I was.

Q. And, did you pursue this classroom study to secure that degree? A. Yes, sir.

Q. Who determined, Mr. Johnson, what studies you should pursue? A. I did. However, I might add that because I did have this advantage of having been an undergraduate at the school. I was able to select my

[82] thesis advisor my first year in graduate school and we actually worked out a plan or strategy which covered the four years of classroom work and on into the thesis year.

We worked that out during the first year and, I believe, during my first semester while actually in graduate school.

Q. In other words then, these classroom studies were of regular subjects and of the regular curriculum of Carnegie Tech? A. That is correct.

Q. Were all students graduate students in these classes, if you know? A. There may have been some exceptions. They were courses offered to graduate students; let's put it that way.

Exceptional students may have been permitted in them. I wouldn't know.

Q. Did you receive a grade? A. In each course, yes.

Q. You took tests? A. I took examinations in each course, yes.

Q. Was there anything different in your attendance at these classes than the attendance of the other students? A. Not at all.

Q. Now, how long did this take, these classroom
[83] studies? A. Four years—four school years.

Q. From 1956 until 1960? A. Until the spring of 1960.

Q. Now, during this period, I believe you stated that you were able to select a thesis topic? A. I did.

* * *

Q. What was the thesis topic that you selected? A. The thesis topic I selected, which I worked on during the educational leave, was the effect of hydrogen on the internal fraction of pure Zirconium.

* * *

[84]

* * *

Q. But, how did you come about to select this topic? A. Through my background and experience as a practicing engineer.

Q. Is this a metallurgical exploration? A. Yes, it is. It was intended to be experimental in nature.

Q. Now, Mr. Johnson, did anybody at Westinghouse tell you to explore this particular subject? A. No, sir.

Q. Was there to your knowledge the same exploration being conducted at Westinghouse? A. No, sir.

* * *

[85]

* * *

Q. And, your educational leave of absence began in 1960, I believe? A. Right.

Q. And continued into 1961? A. That is correct.

Q. During this period, Mr. Johnson, were you doing research on this Zirconium topic? A. That is right.

Q. Did you pursue this to conclusion? A. No, sir.

* * *

[93]

Tuesday Morning,
November 22, 1966,
Jury Present.

* * *

(Richard E. Johnson was recalled as a witness and testified as follows.)

Direct Examination (Continued)

By Mr. Larrimer:

Q. Mr. Johnson, I believe your testimony terminated yesterday on the subject of your thesis topic which related to Zirconium.

* * *

[94]

* * *

Q. Is this in the field of metallurgy? A. Yes, sir.

Q. Mr. Johnson, would you tell the Court and jury how you came about to select this particular subject? A. Yes, I will be glad to. The subject actually evolved over some years, even prior to the time at which I became a metallurgical engineer.

While working in the steel mill, I observed, first hand, the catastrophic effects of having gases such as hydrogen dissolved in metals. The metals can actually fracture under trivial loads.

And, I became aware of second hand information about how the wonder metal Zirconium can be affected by absorption of gases such as hydrogen, nitrogen, or oxygen.

One can take large sheets of metal and, under certain conditions, one can break them as easily as a glass cutter breaks glass in making a window pane for us.

So, I was very interested in gases dissolving in metals before I even received the Bachelor's degree in Metallurgy.

Q. Was this before your employment with Westinghouse?

[95]

* * *

A. Well, I worked there for five years immediately preceding my employment in Westinghouse and while I was going to school full time. So, it would be during that tenure, I would say, without putting a specific date on it.

Q. Well, did this interest then continue over? A. Yes. While I was with Westinghouse, I retained the interest in

gases and metals, but then became somewhat of a specialist in engineering, or what I am called—and called by others—a mechanical metallurgist.

My thesis topic then was in the field of mechanical metallurgy, the mechanics of materials, and it specifically had to do with the mechanical behavior in what we call internal friction.

That can be illustrated by a simple experimental technique involving a wire and a bar with weights on it. Vibrations of the wire measure the changes in mechanical properties and gases absorbed by the metal under vacuum.

Now, first of all, I planned to do a thesis on the effect of hydrogen in titanium, but it turned out, after I was with Westinghouse for I think about a year and a half, a paper
[96] was published in the German Metallurgical Society magazine by the name of Zeitschrif fur Metallkunde which essentially did what I had in mind. It described the effect of internal friction on titanium by virtue of absorption of hydrogen.

So, I changed my thesis topic to direct my attention to Zirconium, the sister metal of titanium. And, I picked up one aspect of hydrogen with this metal that the German authors had not picked up, and that is the rate of change of the hydrogen with the Zirconium into Zirconium hydroxide, which is a precipitate, such as rock candy is a precipitate from solution of sugar and water.

So, I decided to pursue this subject, switching from titanium to Zirconium, and studying those aspects of the technique not covered by the German authors.

Q. So, you had originally considered a thesis topic originally in titanium? A. Originally in titanium, and I changed it, yes.

Q. And, the reason you discontinued this consderation of titanium was— A. It was because the essentials of the work that I was going to do with titanium were published prior to my even going on educational leave.

Q. By a German author? A. Yes, three German authors.

Q. Was this a university publication? Do you
[97] know? A. No. This was work done in an industrial laboratory in Germany.

Q. Now, who was your faculty advisor at Carnegie Tech? A. Throughout this tenure, I had selected Dr. Horne. That is Dr. G. T. Horne.

Q. And, had you discussed with Dr. Horne your titanium idea? A. Yes, I had, sir.

Q. And, had you reached any tentative agreement or any kind of an agreement at all with Dr. Horne as to the feasibility of titanium as a thesis topic? A. Yes. We decided it was feasible. And, the feasibility was borne out by somebody else doing it first.

Q. Did Dr. Horne then conclude that this should not be pursued, about titanium? A. Well, he concluded correctly—and I concurred—that we couldn't do as a thesis something that had already been published.

However, as I say, we did see one aspect of the experiment which had not been in the previous publication.

And so, by changing to a different metal and somewhat changing the experimental concepts, we felt that there was a thesis here. And, that is what I pursued while on leave.

[98] Q. In Zirconium? A. In Zirconium, yes.

Q. How long did you pursue the thesis topic then in Zirconium? A. Well, throughout, let's say, the two years prior to going on leave, the one year while on leave, and about two years after returning to Westinghouse, roughly. And then, I gave it up.

Q. You did not reach an answer? A. I did not, no, sir.

Q. Is there a reason, Mr. Johnson, why you decided to give up this particular thesis topic? A. Well, yes, there is. The strategy that I worked out with the concurrence of Dr. Horne involved quite a lengthy experimental procedure.

Zirconium, I might add, when hot reacts with the gases in the air, and its properties are degraded. So, it has to be protected when heated from the atmosphere, and this involved some complicated experimental setups.

Now, we felt that the plan was feasible because prior to going on leave I was on a fellowship plan which was conceived with a minimum of one year—one calendar year—plus an additional year if necessary.

That is, I was anticipating up to 24 months of educational leave.

[99] Q. From Westinghouse? A. From Westinghouse. But, within a month prior to my original request to go on leave, the fellowship plans were changed and the possibility of going on leave for 24 months was cut down to 9 months maximum.

This left me with a very complicated experimental setup which required my full attention on at least an eight-hour day and sometimes a twelve-hour day at school.

I pursued this for nine months. And then, after returning to work, I was just going to school evenings, and weekends, and it was a losing battle. And I gave it up.

• • •

[101]

• • •

Q. Did you have any connection at all with the Westinghouse Bettis plant physically during this nine-month period? A. Not physically, no, sir.

Q. How did you receive your stipends? A. In the mail, by check.

Q. Did you render any services to Westinghouse during this nine-month period on your regular job? A. No services whatsoeyer as an engineer, no, sir.

Q. Now, at the end of the nine-month period, then what occurred insofar as your activities were concerned? A. My activities at the school then continued only evenings and weekends.

I returned some very few days before the actual termination date of the leave. I was invited to come into the plant and be interviewed by managers and, I think, three or four operational units.

And, I was essentially interviewed as though I was a candidate for a position coming in from the outside. I selected a position mutually agreeable to me and
[102] to one of the managers, and was essentially rehired back into the plant as a practicing engineer.

Q. What type of work, or what project work, did you begin then immediately upon your return? A. I became active in the area of the mechanical properties of plant metals as opposed to the metals which go into the nuclear core.

By this I mean I was working on the nuclear pressure vessel and the piping and the apparatus which are incident to the operation of the nuclear plant.

• • •

[103]

• • •

Q. And, what was the thesis topic that you pursued to success? A. The title was the influence of the system of geometry on fracture toughness.

Q. I am sure I don't know what that means.

[104] But, would you tell the jury and the Court how you came about to select this topic? A. Yes. Again, this is in the area of mechanics of materials. In this case, however, it has to do with what it takes to make a metal break, and to break in a brittle fashion.

• • •

[105]

• • •

Q. Would you tell then the Court and jury how you came about to select the second thesis topic? A. Yes, sir. Again, as I say, this is in the area of mechanical metallurgy. And, this is just another one of the aspects of the mechanics of materials in which I am interested, such as fracture and fracture prevention.

And, I saw a need for this particular experiment based upon my experience as a practicing mechanical metallurical engineer. I discussed this with Dr. Horne and got his concurrence that this would, when completed, be acceptable to the faculty. He and I both agreed that it was a thesis and experiment which could be completed.

I therefore, with his concurrence, went ahead and did the experiment. And, within one year's time, I had a draft of my thesis in his hands.

• • •

[107]

• • •

Q. Now, was there any effort by Westinghouse to direct this particular thesis topic as a subject of investigation? This last one I am talking about, the successful one. A. In a word, no.

Q. This was the sole judgment of you and Dr. Horne? A. That is correct.

• • •

[109]

• • •

Q. Mr. Johnson, do you recall what your salary was immediately before you went on leave? A. Not to
[110] the nearest penny, or even to the nearest dollar. But, it was something slightly below $700 a month before going on leave.

Q. And, do you recall what the salary was when you returned? A. It was to the penny what it was before I went on leave, with the possible exception of a cost of living raise which may have occurred while I was away. This detail escapes me. There was a routine cost of living raise.

• • •

[111]

• • •

Q. Is your thesis—or the results of your thesis—available now? A. Yes, sir. There are actual copies of the thesis available at the library at Carnegie Institute of Technology, filed according to their card catalogue system.

And, I will go one step further. The Bettis Laboratory saw fit to publish my thesis as a Bettis document. That is, they assigned a Bettis alpha-numerical number to it, and issued it through the usual AEC channels as something in the public domain.

That followed, of course, the act of publishing
[112] it at the school.

• • •

Cross-Examination

By Mr. Arkin:

Q. Mr. Johnson, you testified that you first became interested in employment with the Bettis Atomic Power Laboratory while you were a senior in college? A. Yes, sir.

Q. Doing undergraduate work? A. Yes, sir.

• • •

[113]

• • •

Q. Was one of the factors you considered whether or not you would take the job at Bettis with their health plan benefits that they offered? A. I beg your pardon?

Q. Their health plan benefits. A. Health plan?

Q. Were you not interested in the fringe benefits that they offered? A. I suppose everyone is interested in fringe benefits, yes. I don't think that was a consideration in getting employment there.

That is something one sort of takes for granted these days, that there will be some kind of fringe benefits, even if it is only getting time off to appear in court.

• • •

[115]

• • •

Q. Now, all of these things—salary, the benefits of the company, and the Doctoral Program—were things you took into consideration in determining whether or not you would take the job? A. There is an order of preference, but I will answer a qualified yes.

Q. What order of preference? A. The Doctoral Program was most important, the salary second important, and the fringe benefits less important.

Q. In order to qualify for the educational leave
[116] under this Doctoral Program, you testified you had to sign a contract with Westinghouse? A. I did not. Or I don't believe I did.

Q. Did you sign what is called an employment agreement? A. An employment agreement?

Q. With Westinghouse? A. This is a patent agreement you are talking about?

Q. No, sir. Let me rephrase the question. I don't think we are talking in the same vein. A. I am afraid we are not.

Q. In order to qualify for the educational leave phase of the program— A. Oh, yes. For that, yes.

Q. You did have to sign a contract? A. An employment agreement, yes, for the leave phase.

• • •

Q. Now, your employment agreement required you to stay in the employ of Westhinghouse for a period of two years after you returned from educational leave? A. That was the stipulation, yes.

• • •

[119]

• • •

Q. Mr. Johnson, I am handing you a Xerox copy marked Defendant's Exhibit No. 3. Would you describe that? A. This appears to be a copy of the employment agreement signed by me prior to my going on educational leave.

Q. Is that your signature? A. I believe it is, sir.

Mr. Arkin: Your Honor, we offer this into evidence.

Mr. Larrimer: No objection.

The Court: Let it be admitted. Defendant's Exhibit 3 is admitted.

• • •

Q. And, when did you begin on the program?
[120] What date? A. Well, I would like to think that I actually began when I started working with Westinghouse, which was June of 1956.

However, I believe, as a technicality, you can only say I began it as of September of that year when I actually began class work at school.

Q. September of 1956? A. Yes.

• • •

Q. What was the amount of the payment made to you during the period of your educational leave? A. My memory tells me it was $630 a month.

Q. Was that payment based upon two factors; a percentage of your base salary, plus what is called
[121] adders, which is a formula based on your dependency status? A. I believe that is correct, sir, yes.

Q. Now, while you were on educational leave, did you retain any of the employee benefit programs which were available to you? A. Some, yes, and some, no.

Q. Well, how about the health plan benefits or the hospitalization? A. I am going to have to beg off on this because this is a matter of record. I recall that there was an option on something. I believe it was a pension plan that I could exercise an option to carry it or drop it. And, if I dropped it, to pick it up at a later date.

I exercised the option while on leave to drop all those things which I felt I could and was allowed to drop. And then, I picked them up again after I returned to full time employment.

Q. So, this was your choice? A. It was an option that was offered, and I took it, yes.

Q. Westinghouse allowed you to keep these things, or you had the option to drop them? A. As far as I know, this is a correct statement of the facts.

• • •

[123]

• • •

Q. Were you limited in your choice of universities? Could you have gone to Duquesne? A. No, sir, it was a program with Carnegie Tech, and so advertised.

• • •

[124]

• • •

Q. All right. Now, while on the program were you limited in any way as to what field of study you could undertake? A. Yes. I think I can help you out and phrase it correctly.

I was limited to those subjects which were directed toward obtaining a PhD in metallurgical engineering.

• • •

Q. Before you took educational leave, you were involved in your work at Bettis in studying nuclear core materials? A. Yes, sir.

Q. Now, when I interviewed you last January, you told me at that time you were studying nuclear non-core materials? A. Yes, sir.

Q. Isn't it true that those subjects—those two subjects—differ very little? A. It depends entirely on one's frame of reference. I am a mechanical metallurgist. I
[125] was applying the techniques and principles of metallurgy to both core before leave and non-core after leave materials.

So, I would agree with you providing it doesn't enter a degree of confusion.

Q. In your field of interest then, both these subjects involve the study of mechanical properties of metals? A. Yes, sir.

Q. The thesis which you completed also involves the mechanical properties of metals, doesn't it? A. Yes, sir.

Q. Now, you testified, sir, that you received those pay-

ments during your educational leave period by check? A. I believe that is correct.

• • •

Q. Were taxes withheld from that check? A. I believe they were. Yes, I believe so.

• • •

[127]

• • •

Q. You had also a requirement that you submit bi-monthly reports? A. Yes, sir.

[128] Q. And, you also had to clear your thesis proposal through Westinghouse? A. Through the technical information office, yes, sir.

• • •

[130]

• • •

DR. GERALD T. HORNE,

called as a witness in behalf of the Plaintiffs and being duly sworn, testified as follows:

Direct Examination

By Mr. Larrimer:

Q. Will you state your name? A. Gerald Terrence Horne.

• • •

Q. And, what is your present employment? A. I am presently employed as an assistant manager in the research engineering division, Glass Research Center, Pittsburgh Plate Glass.

• • •

[131]

• • •

Q. Were you, previous to your employment at Pittsburgh Plate Glass, associated in any manner with Carnegie Tech? A. Yes, I was.

Q. For what period of time? A. I was a member of the staff of the Metals Research Laboratory from about 1951 as an assistant professor, and then as associate professor

I was in the Department of Metallurgical Engineering from about 1952 to 1963—no, that was 1964.

• • •

[132]

• • •

Q. Now, Doctor, do you know one of the Plaintiffs in this case, Mr. Johnson? A. I know Mr. Johnson.

Q. And, in what capacity did you know him? A. I knew him as an undergraduate student and as a graduate student in the Department of Metallurgical Engineering at Carnegie Tech. And, more specifically, as a graduate student who did his thesis essentially under my direction.

• • •

[133]

• • •

Q. All right. What function would you have performed as a faculty advisor for Mr. Johnson? A. Well, "faculty advisor" is a term which covers everything from suggesting courses of study or essentially approving courses of study, to being a thesis advisor.

In this case, I was a thesis advisor and I was probably a faculty advisor worried about what courses he was going to take sometime previous to that, but I do not know when.

As his thesis advisor, which I think is the more specific question here, my duties were essentially to help Mr. Johnson to arrive at a thesis subject which would be doable and which he would not end up being unable to complete.

Also, to advise him during the doing of such a thesis, and to handle a certain amount of the logistics in getting that thesis approved.

• • •

[135]

• • •

Q. Now, were you aware of this Doctoral Program that was jointly sponsored by Westinghouse and Carnegie Tech? A. Yes. I know several of the students from Westinghouse who were a part of that in our department.

Q. Who in your department, if you know, established this program on behalf of Carnegie Tech? A. Dr. Robert F. Mehl was involved. He was head of the Department of

Metallurgical Engineering and he was involved as dean in the negotiations with Westinghouse as to what the program should be from Carnegie Tech's standpoint.

• • •

[136] Q. Was there any change in the requirements of Carnegie Tech as a result of this program? A. None.

Q. Who determined the scholastic requirements that had to be satisfied before a PhD would be granted by Carnegie Tech? A. They were established before this program by Carnegie Tech and they were not changed.

Q. In other words, Westinghouse imposed no conditions or restrictions on the scholastic requirements of this PhD degree? A. No.

• • •

[137]

• • •

Q. Mr. Johnson has testified that he originally selected an investigation of Zirconium. A. Yes.

Q. Do you recall this? A. Yes.

Q. Would you relate how this came about, the selection of this particular topic? A. Well, I hate to make a speech, but to answer the question, if you will indulge me, in general a PhD degree guarantees to a prospective employer—somebody who is going to hire him—that this person is capable of doing "original research".

Now, in general, I teach—or taught at that time—courses to graduate students. And, they are courses of study describing what the world knew about a certain aspect, what had been found out, and what somebody else thought about a given subject.

Now, these courses are taken by graduate students and they are examined on them. And, these are tests
[138] of scholarship. It is not "Does the student know what other people have done" or "Does he understand what they have done", but it is an original approach. There is at the moment no other way that I know of to test original research other than to do it in this manner.

So, a PhD student comes down to doing his thesis, which is the original research accounting, and for which he is essentially responsible. It is normally a long, drawn out

process. He will spend somewhere between one year and three years doing it, and sometimes more than three years. He will get deathly tired of it, and he will be ready to throw it up. They all do sooner or later.

So, one of the things I look for in a student—or looked for—was an involvement by him in this problem, whatever the thesis problem was going to be. And, I would want to be assured it would be something he really wanted to know the answer to.

Now, the easiest way to get this is to let him dream up his own problem. If he thinks it up and if he gets involved in it, then he won't, a year and a half later, say "This is a lousy problem that some silly professor gave me and which I didn't want".

• • •

[142]

• • •

Q. Was there any difference in the requirements which Mr. Johnson had to satisfy to get his PhD degree from Carnegie Tech as distinguished from the requirements for the other students? A. No, none whatsoever.

• • •

[145]

• • •

Q. Dr. Horne, were you aware of other students who were in a capacity similar to Mr. Johnson, in that they were seeking the degree of Doctor of Philosophy in engineering from Carnegie Tech who were being subsidized while they were seeking this degree? A. Yes.

Q. Were the scholastic requirements any different for those students than for Mr. Johnson? A. No, they were not.

Q. Were the studies that had to be successfully pursued by those students any different than for Mr. Johnson? A. They were not.

Q. Were there any more or less conditions or restrictions, if any, imposed by the other grantors of the subsidies than by Westinghouse? A. Imposed on whom?

Q. On Carnegie Tech? A. Oh, no.

• • •

[148] Cross-Examination

By Mr. Askin:

• • • •

[149]

• • • •

Q. What these negotiations were concerned with was more or less the mechanics of the program? A. Agreed. The mechanics and almost certainly the money. And, almost certainly as well the—

[150] Well, Dr. Mehl spent a healthy hunk of his time making sure that these were ordinary graduate students, and that Westinghouse did not prescribe for them.

• • • •

[154]

• • • •

Q. Do you know if Westinghouse had any control over the specific thesis topics chosen by any of the three Plaintiffs? A. I can speak only for one directly. Over Mr. Johnson, there was none.

Q. Do you know whether or not there was a shortage of trained PhD personnel in metallurgical engineering in the 1960's? A. There was.

Q. A great shortage? A. The newspapers and the magazines indicated a tremendous shortage.

Q. Now, when we are speaking of persons with the records of Dr. Johnson, Dr. Pomerantz and Dr. Wolfe—people with B-plus or A records—was there a

[155] a great deal of demand for personnel with such records as theirs? A. As students, or as what?

Q. As PhD's? A. You mean having completed a PhD?

Q. Yes. A. There was.

Q. Now, who was interested in employing PhD personnel, by category? Was industry interested? A. Very much.

Q. And, education? A. Yes.

Q. There was an overall shortage at this time? A. Yes. We had recruiters attempting to recruit them from industry, government and other educational institutions.

• • •

[157]

* * *

RICHARD A. WOLFE,

called as a witness in behalf of the Plaintiffs and being duly sworn, testified as follows:

Direct Examination

By Mr. Larrimer:

* * *

Q. Where are you presently employed? A. At Westinghouse Bettis Atomic Power Laboratory.

Q. When did your employment at Westinghouse begin?

A. In August of 1952.

[158] Q. In 1952? A. Yes.

* * *

Q. What is your educational background? A. I got a BS degree in metallurgical engineering from the University of Cincinnati in 1952.

Q. Did you then continue with your education? Did you get a Master's degree? A. Yes. I received a Master's degree from Carnegie Institute of Technology in 1956.

Q. 1956? A. Yes.

Q. At this time, were you employed by Westinghouse? A. Yes.

Q. Up until this time in 1956, had you secured any kind of a leave of absence from Westinghouse to continue your education? A. No.

Q. Now, do you now have a degree of Doctor of Philosophy? A. Yes.

Q. When did you secure this degree? A. In June of 1963.

Q. And, was this degree secured under this

[159] Westinghouse Doctoral Program? A. Yes.

Q. You are one of the Plaintiffs in this case? A. Yes.

Q. Mr. Wolfe, would you tell the jury how you became interested in this program? A. Well, when I obtained my MS degree, I made a decision that I would continue my education to obtain a PhD degree in the same department, the same field, metallurgical engineering.

So, I went to the head of the Department of Metallurgical Engineering, Dr. Mehl at that time, and inquired about it.

Q. Is this the Dr. Mehl that Dr. Horne has referred to? A. Yes. It is Dr. Robert F. Mehl, who was then head of the Department of Metallurgical Engineering and dean of graduate studies.

I inquired about the availability of a fellowship. And, during the course of the conversation, he told me of the Bettis Doctoral Program which then had not been made public, but whose arrangements were then being made.

Q. As a result of this information by Dr. Mehl, what did you do then? A. Well, in the course of that
[160] conversation, Dr. Mehl requested that I, rather than ask for another fellowship, apply since I was already employed at Westinghouse, and he suggested that I apply for one of the Bettis Doctoral fellowships or scholarships.

Q. Did you so apply? A. I did apply.

Q. What process occurred then? I take it you were accepted? A. I applied and I was accepted. And then, I enrolled the following fall. That would be the fall of 1956.

Q. At the time of your conversation with Dr. Mehl, had you then received your Master's degree from Carnegie Tech? A. Yes.

• • •

[161]

• • •

Q. And, you began at what period of time? When did you begin the studies for your Doctor's degree? A. I began in the fall of 1956, in the fall semester.

Q. And then, how long would you have studied before your leave of absence? A. Well, because I had obtained a MS degree, I had already done a large part of the class work, or course work.

So that, I only had about two years, or about two and a half years, left of course work to complete.

Q. And, how did you complete this course work, timewise? A. Well, I completed it during a period of about two years, or two and a half years, on this relief time program, working part time and having eight hours a week off.

Q. You would work how many hours for Westinghouse? A. Thirty-two. And, there would be eight for school.

Q. You would have eight hours off? A. Yes.

Q. During this period of time, you were of course being compensated by Westinghouse? A. Yes.

• • •

[162]

• • •

Q. Now, your leave period began, I believe, in 1960. What period of time did you have? A. One year, from March of 1960 to February 28, 1961.

Q. And, do you remember the amount of the stipend that was paid to you during this one-year period? A. Not really, no. It was somewhere on the order of $900, I believe.

Q. What was your thesis topic? A. Anomalous diffusion in body-centered cubic transition metals. That was the title of it.

The topic dealt with how fast atoms move around inside of solids, from one part of the solid to another, and how fast atoms diffuse.

Q. Did you reach a conclusion? Were you able to determine this? A. Well, the idea was to try to obtain data which would solve some problems and uncertainties and gaps in the knowledge that was present at that time.

Are you asking how successful was I?

Q. No. Let me backtrack there. How did you come about to select this particular topic as a thesis topic? A. Well, prior to going on leave, I talked to professors in the Department of Metallurgical Engineering.

[163] Q. At Carnegie? A. At Carnegie Tech, yes. I talked to them about thesis topics.

I went to those professors whose fields of endeavor were concerned with what I was interested in, and we discussed problems in physical metallurgy and what might be done to obtain data to understand more fully these problem areas.

After this discussion with several professors, I picked an area or a topic of problem that I was interested in, and then worked out a proposal for a type of research or a type of study which was agreeable to the thesis advisor I had selected.

Q. Had you been directed by any of the personnel at Westinghouse to select this particular topic? A. No.

Q. What control if any did Westinghouse have on the selection of your thesis topic? A. None on the selection.

Q. After a topic was selected, were you required to advise them of the topic? A. Yes.

Q. And, what was the purpose of this, if you know, of telling them what your topic was? A. I am not sure.

[164]

* * *

Q. Did you in fact inform Westinghouse of your thesis topic? A. Yes. I submitted it for approval by the technical information office to show that it was publishable.

Q. And, would this have been done prior to your leave of absence? A. Yes.

Q. Was it approved? A. Yes.

Q. Were there any conditions or restrictions imposed on the approval? A. No.

Q. How were you advised of the approval, if you recall? A. I would guess in a letter.

* * *

[165]

* * *

Q. Now, you heard the testimony of Dr. Horne. Did Dr. Paxton function in the same capacity with regard to you as Dr. Horne did with regard to Mr. Johnson? A. Yes.

Q. Did Dr. Paxton collaborate with you in the selection of this particular topic? A. Yes.

Q. Prior to the time that you went on leave—prior to the time that you took this twelve months leave of absence—what particular job did you have at Westinghouse? What were you working on at Westinghouse, if it is not classified? A. I was working in a department or a group, whose function was to find new and improved ways to fabricate or make fuel elements where the fuel element is that part of a reactor that contains the uranium.

Q. And, after you came back to work to Westinghouse, did you go back to work in the same group? A. No. I went into a different area. I went to work in ceramics rather than in metals.

Q. Now, Mr. Johnson and Mr. Pomerantz have each testi-

fied that they signed an employment agreement. Did you sign any such agreement? A. No.

[166] Q. Were you advised that you were expected to return to Westinghouse at the termination of the leave? A. I believe, yes, they expected me to return. And, I expected to return.

Q. When you returned, were you compensated at the regular rate upon your return? A. Yes, for my job classification.

Q. What was your classification upon your return? A. Senior engineer.

Q. Does that carry with it a designated salary? A. It carries with it a designated salary range.

Q. A range? A. For each job classification, there is a range in which a person's salary falls, yes.

Q. And, was your salary within this range? A. Yes.

Q. And, you received that upon your return and you have received your compensation since then for your designated title? A. Yes.

• • •

[167]

• • •

Cross-Examination

By Mr. Arkin:

• • •

[168]

• • •

Q. In order to refresh your recollection, I hand you Defendant's Exhibit No. 5. That is a copy of a letter that was sent to you, is it not? A. Yes.

Q. Do you recall receiving that letter? A. Well, not exactly. But, I am sure I did.

Q. Are you familiar with the contents generally? A. Yes.

Q. Like Doctors Johnson and Pomerantz, you also were required to make reports? And, I believe your reports were quarterly to Bettis while you were on educational leave? A. Yes. That was requested.

Q. And, on the last page of that letter, you said you didn't recall if you were informed that you were expected to return. Does that refresh your recollection? A. Yes. It states that.

Q. It states what? A. "Each participant is expected to return".

[169] Q. Did you honor that commitment? A. Yes. I am still there.

Q. Now, while you were on educational leave, did you lose any of your employee benefits? Did you lose your health insurance? A. No, I don't believe so. I don't recall exactly, but I don't think I did.

• • •

Q. Did you lose any of your retirement benefits? A. No.

Q. Did you lose your life insurance benefits? A. No.

Q. What about your seniority? Do you know how that was handled? In other words, for nine months you were essentially out of the Bettis Laboratory, is that

[170] true? A. Yes. It was twelve months.

Q. Yes, twelve months. Did you then lose a year's seniority? A. No.

• • •

[171]

• • •

Q. Now, did you testify that the checks were mailed to you? A. No, I didn't testify to that.

Q. Were they? A. No, I don't believe so. They were mailed directly to the bank.

The Court: Mailed where?

The Witness: To the bank.

The Court: To the bank? You don't mean the bank got the money?

The Witness: Well, at Westinghouse—and I guess this true of many concerns—the employee has an option to have the pay sent to his house or to the bank where he has an account.

And so, mine were sent to the bank.

The Court: And, they were deposited in your account?

The Witness: They were deposited in my account, yes.

• • •

By Mr. Arkin:

Q. All right. Now, the amount of those checks, was that based upon a percentage of your base salary plus

[172] adders for dependency status? A. It was based on marital status, number of children and base salary.

Q. Now, you began your educational leave before July of 1960? A. Yes.

Q. And, you have before you Plaintiffs' Exhibit 1, is that correct? A. No.

Q. No, excuse me. Here it is.

I hand you Plaintiffs' Exhibit 1, and ask you if those are the rules and regulations which governed your educational leave period? A. Since it is dated December 1957, I would say yes, I think it is, although they were changed from time to time. But, I believe this applied.

Q. Does that look familiar to you? A. Yes.

Q. This is a different program or a different statement of rules and regulations than that which applied to the other two Plaintiffs, isn't it? A. Yes.

Q. On page 5 of that exhibit you will see your reimbursement clause? A. Yes.

[173] Q. Now, does that not state that the stipend shall be equal to 70 per cent of your salary, plus adders? A. Yes.

Q. With a maximum additional allowance of ten per cent depending on your dependency and marital status? A. A maximum of 20 per cent.

Q. Yes, 20 per cent. So then, the maximum amount you could receive under this program was 90 per cent of your base salary? A. Yes.

Q. Is that what you received ? A. Yes.

Q. Now, the checks when they were deposited in your account, were they checks for the gross amount of 90 per cent of your base salary, or were taxes withheld from them? A. Taxes were withheld.

• • •

[175]

• • •

Q. And, within the field of metallurgy itself, were you restricted as to your topic by Westinghouse? A. No, not at all.

Q. So that, a restriction in your thesis topic to metallurgy was a self-imposed restriction that you made yourself? A. Yes. I made that choice years before the program was developed.

• • •

[177] INDEX

Witness	Direct	Cross	Redirect	Recross
Campbell C. Yates	178	197		
Clyde E. Vogeley, Jr.	217	223		
William A. Quinn	225	238	242	
Orval A. Redhair	245	250		
William F. Maher	251			
Martin A. Daugherty	255	291	296	
John R. Van Horn	297	303		
William A. Quinn (recalled)	312	314		
Richard E. Johnson (recalled)			315	

[178]

* * *

CAMPBELL C. YATES,

called as a witness in behalf of the Plaintiffs and being duly sworn, testified as follows:

Direct Examination

By Mr. Larrimer:

Q. Your name? A. Campbell C. Yates.

Q. You are professor at the University of Pittsburgh? A. That is correct. My title is Professor of Aero-Space Engineering in the Department of Mechnical Engineering.

* * *

[181]

* * *

Q. Do you know Mr. Pomerantz, one of the Plaintiffs in this case? A. Yes, I do.

Q. How did you get to know Mr. Pomerantz? A. He was a graduate student in the Department of Mechanical Engineering at the University.

I was also his thesis advisor. By this I mean that I was the faculty member who was responsible to see that he did the proper type of work and that he followed through in his research for the degree of Doctor of Philosophy in mechanical engineering.

* * *

[183]

• • •

Q. Professor, would Mr. Pomerantz have had to have met any scholastic requirements in order to get in graduate school, to enroll as a graduate student? A. Yes. He would have had to have met our minimum requirements of a 3.0 average, as we refer to it, or a B average in terms of scholastic average.

If he did not have this—and I am not familiar with his background at this particular time in terms of his admission—we might have admitted him on probation. But, as I recall, I think that he probably met these requirements without any difficulty.

Q. And, are these requirements established by the University of Pittsburgh? A. They are established by the graduate faculty of the University of Pittsburgh, yes.

Q. Tell me, to your knowledge, Professor, did the Westinghouse Electric Corporation or the Atomic Energy Commission have anything to do with establishing these requirements? A. Not to my knowledge, they didn't, no.

• • •

[185] Q. Now, how did you become aware of the thesis topic which Mr. Pomerantz had selected? A. Well, the matter of selecting a thesis topic is sometimes a rather devious trail.

Generally it happens this way. The student, first of all, has an interest in a particular specialization within the field of mechanical engineering. And—

Q. Excuse me. How did you become aware of this particular interest on the part of the student? A. From conversation with him and from contact with him as an advisor. And, his advisor previous to the time that I was his advisor had talked to him.

He would also indicate this field when he took his comprehensive examination. He would have indicated to us then that he was interested in a field of fluid mechanics or stress analysis or elasticity or one of the principal fields that we have in the department.

Q. All right. I was asking you about the selection of a thesis topic. A. Well, the faculty members also have an interest in certain specialized areas. And so, it becomes a problem of matching these interests.

The student, having an interest in a certain specialization, then discusses this interest with a faculty member.

And, there is, of course, a question of the
[186] suitability of a topic.

Sometimes the subject material will be suggested by the faculty member and sometimes by the student. In this case, I do not recall the specific details.

The department itself had considerable interest in the problem of boiling heat transfer. We were building a new facility at that time to do boiling heat transfer work.

And, this problem, whether suggested by Mr. Pomerantz or the faculty at the time, is along that line. It is a problem in boiling heat transfer.

Q. Was this a problem then of interest to the faculty at the University? A. Yes, very definitely.

Q. Would there not naturally then be a matching process between the topic selected and the faculty advisor? A. Yes. In general, it seems very obvious to me that we would not assign a faculty member to a student if the faculty member had no interest in the problem whatsoever.

Now, it may be that the problem is sort of on the fringe area of the faculty member's interest. But, nevertheless, there would be a one-to-one correspondence of interest in this topic to a certain degree.

Q. Now, after there had been a designation of a thesis topic, is it submitted to you as a faculty member
[187] as being his thesis topic? A. Well, what the candidate has to do is prepare a proposal, in effect, and this proposal is given to us in duplicate so that we can pass it out to a number of faculty members who form a preliminary committee to screen this topic and decide whether or not it meets the requirements of a dissertation.

Q. That is just the topic itself before there is any research ever conducted? A. This is prior to any research being conducted.

Now, the candidate, of course, to present this proposal must have made a thorough literature search to make sure that he is not proposing a topic which has already been done. That is, that he is not proposing to repeat work which is already in the literature.

The thesis requirement is that the man produce some new knowledge in the field. This must be original research. He must produce either a new method of solving

a problem, or a method of solving it better, or a manner of handling the problem in a more suitable, accurate or successful way.

It must be the actual product of new knowledge, so that he has done some research in the preparation of it. And, basically, we must be assured that there has been a strict literature search.

Q. Professor, who determines this as a necessity, [188] that it be new knowledge? A. The requirements of the University.

Q. The University of Pittsburgh? A. Yes. That would be in the requirements for the degree.

Q. And, what is the reason for this? A. Well, basically I will have to answer that, I guess, in answering what I believe the Doctor of Philosophy degree indicates.

That is, it indicates that this man has reached a level that he can handle the very complex problems, first of all. And, secondly, that he is capable of doing individual work and actually probing into the unknown. It indicates he has reached a degree of sophistication in his work that he can actually extend the frontiers of knowledge.

And, the purpose of the dissertation is for the man to prove this to the faculty of the School of Engineering.

Q. Is this then a testing apparatus or testing device? A. Partially, I guess. But, at the same time, it is basically a part of the educational process for this man, because it permits him now, without bounds of formal course work, to actually delve into a specialized area and increase his knowledge in depth in this particular specialization.

Also, it serves a twofold purpose. One, you [189] might say, is a screening purpose, to determine whether or not he is the caliber of man, intellectually and in terms of training and background, who should receive the Doctor of Philosophy degree.

But, secondly, it is a part of the learning process for him to learn how to adapt everything he has learned up to this time to the solving of a new problem.

Q. Now, who would make a decision as to whether a particular thesis topic would be acceptable to the University? A. That would be in the University of Pittsburgh, in our department. And, this varies somewhat from department to department.

There would be a committee which would screen this preliminary proposal and would decide whether or not this topic was saticfactory.

Q. Do you recall the thesis of Mr. Pomerantz? A. Yes. It was a problem dealing with film boiling, the boiling of liquids, and the involved acceleration.

• • •

[190]

• • •

Q. You were advisor to other students who were candidates for the degree of Doctor of Philosophy? A. Yes.

Q. Did they similarly select a thesis topic? A. Yes.

Q. And, was the thesis topic similarly screened as to the necessary attributes as you have described? A. Yes.

Q. Was there any difference in the requirements which must have been met by Mr. Pomerantz with regard to his thesis topic than any other graduate student in

[191] your Department of Engineering? A. No.

Q. Professor, did you receive any communication at all from Westinghouse directing this particular thesis topic be pursued by Mr. Pomerantz? A. Not to my knowledge, no. I don't recall any such correspondence.

Q. Were any restrictions placed upon this to your knowledge, upon this thesis topic and the investigative process, by Westinghouse? A. You mean as the work was done at the University?

Q. Yes. A. Not to my knowledge, no.

• • •

[192]

• • •

Q. Let's get back to the thesis itself. After the thesis topic was approved, was it successfully then concluded to your knowledge? A. Yes, it was.

Q. Do you recall how long this took Mr. Pomerantz? A. I believe it was in excess of nine months. I can't be any more specific than that. It was at least nine months.

Q. Very well. And, what was the procedure by which the investigative process was approved? A. You mean the results of the investigation and dissertation?

Q. No. How was it approved by the University? What was the procedure in defense of the thesis? A. Well,

after the man has completed his research,
[193] he must of course defend this as a part of his final oral examination. And, this defense is before a committee of the faculty.

Q. Excuse me. Let me interrupt. After he does his investigation, then he writes a report? A. That is correct. He must write a formal dissertation. He writes a thesis on this and presents it.

This volume has in it all of the background information and the literature search that shows that this problem is original. It also presents the purpose of his investigation, how he intends to do it, and then it presents the actual method in which he did the investigation, the results and the conclusions he formed from this investigation.

All of this appears in this bound copy eventually, or bound report.

Q. Then, what is the defense? A. Then, he must defend this before a committee. After it is written, the written version of it, of course, is available beforehand to the committee members. They are at liberty to read it.

And then, there may be questions on the part of any member. There could even be questions as to the suitability of the topic at that time if they cared to go back that far.

Q. Is any notice given to the public? Is the
[194] public invited to this defense? A. No, I don't believe so. I don't think there would be any objection to anyone who had a valid reason for wanting to sit in on one of these oral examinations.

Of course, in general the other members of the graduate faculty outside the school are invited. By that I mean that someone from the School of Education or the Department of Mathematics, if they wished to sit in on the examination, would be perfectly free to come in and observe the examination.

Q. And, Mr. Pomerantz successfully defended his dissertation? A. Yes, he did.

Q. And, was he awarded the degree of Doctor of Phiosophy? A. Yes.

• • •

[197]

Cross-Examination

By Mr. Arkin:

Q. Professor Yates, you testified that the University controls the thesis in general? A. Yes. The University controls the thesis. And, by this we mean that we are the ones who approve the topic and say that this is appropriate as a subject for a dissertation.

Q. Do you know of any other control exercised upon the choice of thesis topics? A. Not at the University, no.

Q. Not at the University. You also testified that you had other students on subsidized study such as NASA grants? A. Yes.

[198]

Mr. Arkin: At the close of the Plaintiffs' evidence, the Defendant respectfully moves this Court to direct the jury to return a verdict for the Defendant upon the following grounds:

One, the Plaintiffs have failed to prove the primary purpose of the payment.

Secondly, the Plaintiffs have introduced no evidence as to the primary benefit derived from the studies.

Thirdly, the Plaintiffs have failed to prove that these payments were not compensation for past, present

[199] or future services, or for services under the direction and control of the grantor.

And, fourthly, the Plaintiffs have failed to prove by a preponderance of the evidence that the determination of the District Director of Internal Revenue was erroneous.

[203]

The Court: . . .

And now, we have a jury to decide it. So, we will let the jury decide it. . . .

The motion is denied.

[217]

CLYDE E. VOGELEY, JR.,

called as a witness in behalf of the Defendant and being duly sworn, testified as follows:

Direct Examination.

By Mr. Arkin:

Q. Dr. Vogeley, would you state your name and address for the record, please? A. Dr. Clyde Eicher Vogeley, Jr., 185 Peach Drive, Pittsburgh 36.

Q. By whom are you employed, sir? A. Westinghouse Electric Corporation.

Q. For how long have you been employed by Westinghouse? A. I have been employed by Westinghouse since 1944.

[218]

Q. What field did you work in in 1956? What office? A. In 1956, I was a senior engineer in the training group of the Bettis Atomic Power Laboratory.

Q. And, what is the training group? A. The training group is a group at the Bettis Atomic Power Laboratory that has cognizance for the training of Bettis personnel and customer personnel.

This includes giving course work in areas that are important to reactor engineering, and it also includes cognizance for the Doctoral and Fellowship Programs.

[219] Q. Are you familiar with the regulations of the Doctoral and Fellowship Programs? A. Yes.

Q. When did you first become familiar with those? A. Well, when I reported in 1956 to the Bettis Atomic Power Laboratory, one of the first tasks that I was assigned was that of putting the Doctoral Programs on a sound administrative basis. And, I generated the first set of rules and regulations.

Q. Do you mean that you wrote the first set? A. Yes.

Q. In order to write the first set, were you familiar with the purposes and ideals of the program? A. Yes, I believe that I can say that I was in the sense that I conferred

with my superiors to ascertain what those goals and those purposes were.

Q. Could you tell the jury what those goals and purposes were, sir? A. Well, I think they were twofold. One aspect of it was to attract to the Bettis Laboratory very bright young engineers and scientists. The other aspect was to upgrade people within the laboratory, people who were already there.

Q. Was that important to Bettis? A. Yes.

[220] Q. At that time? A. Yes.

Q. Why? A. Well, I think you can categorically say that in the world in which we live today—and even then, I think, and even more true ten years ago—that there was a shortage of this kind of people.

Q. What kind of shortage? Was it a serious shortage? A. I really couldn't judge that. I would say that the Bettis Atomic Power Laboratory felt that they needed more of this kind of people.

Q. What do you do now, sir? A. I am now manager of technical training.

Q. As manager, what are your duties? A. My duties are to manage the training group.

Q. Do you handle the day to day affairs of the training program, or is that handled by someone else? A. Well, the day to day affairs of the Doctoral and Fellowship Programs are handled by Mr. William Quinn, who reports to me.

Q. I see. Now, sir, do you know the source of the funds? A. The primary source of the funds is the Atomic Energy Commission.

[221] Q. Are you required in any way to report to the Atomic Energy Commission what you are doing? A. Yes. We do file reports with them.

Q. How often? A. Oh, it must be about—I can't answer that exactly. It depends on the nature of the report. I would say every six months.

• • •

Q. Sir, do you know if the Bettis Atomic Power Laboratory has any contractual relationship with the Atomic Energy Commission? A. Yes. There is a contractual relationship.

• • •

[222]

Q. Is it in writing? A. It is my understanding it is a written contract.

Q. Are you familiar with its terms? A. Not in detail, no.

Q. Are you familiar with its terms in regard to your particular area? A. Yes.

Q. Now, you testified earlier that you submitted reports to the Atomic Energy Commission regarding the program. What is the purpose of those reports? A. Well, they are status reports, really.

Q. Would you explain that, sir? A. Well, it is how many people are currently on the program, what has been the productivity of the program, and what has been the cost, and matters like this.

Q. Can you give me a general idea of how many persons you have had on this program since its inception? A. I think that the maximum number of people that were ever on the program was in the neighborhood of 112. In terms of productivity, I would say in very round numbers we have had 60 PhD's produced by this program.

Q. Now, sir, you testified that Mr. William Quinn runs the day to day affairs of the program?

[223] A. That is correct.

Cross-Examination

By Mr. Larrimer:

Q. Dr. Vogeley, you are a doctor in engineering? A. In mathematics.

Q. You stated the purpose of the program was two-fold; one was to attract people to Bettis, and the other was to upgrade those people already there.

Now, would it be accurate to say that the way you do this—the way you attract people to Bettis—is to offer them this Doctoral Program? A. That is certainly one of the attractions.

Q. Well, aren't we talking— A. It is to this kind of people.

Q. Well, aren't we talking about this Doctoral Program? A. If you are talking about this Doctoral Pro-

gram, it is one way of attracting bright young people to the laboratory.

• • •

[225]

• • •

Q. Would it be accurate to say that this is a program under which a person may attend a university or an educational institution as a student and secure a degree from that university while being subsidized by Westinghouse? A. Yes. He may attend the university as a student while receiving reimbursement from Westinghouse.

Q. Would you not agree with me, Doctor, that this stipend of $630 that is paid to these men while they are on their leave of absence is a living allowance to them while they are pursuing their research? A. It is a sum that is paid to them so that they can devote their attention to the completion of their dissertation.

• • •

WILLIAM A. QUINN,

called as a witness in behalf of the Defendant and being duly sworn, testified as follows:

Direct Examination

By Mr. Arkin:

[226] Q. You are Mr. William A. Quinn? A. Yes.

Q. What is your address, Mr. Quinn? A. 709 Elina Drive, Monroeville, Pennsylvania.

Q. And, by whom are you employed? A. By the Westinghouse Electric Corporation.

Q. For how long have you been so employed? A. Since September 1957.

Q. What is your job with Westinghouse? What do you do? A. Well, I am staff assistant in the technical training department at Bettis.

Q. What are your duties? What does that entail? A. Administering certain training programs. And, included among these are the Bettis Fellowship and Doctoral Programs.

Q. You are the day to day administrator of these programs? A. That is correct.

Q. Do you select certain graduates to participate in the program? A. Well, the program works in this manner.

The graduates will apply through my office, at which time their qualifications are reviewed by a panel of senior technical members of the management at the Laboratory, who make recommendations as to whether these men
[227] are to be selected or not.

Q. Are you familiar with the criteria used in making such a determination? A. Yes, I am. I perform a preliminary review.

Q. What criteria are used to determine whether or not a person should be accepted into the program? A. We look for a person with a minimum undergraduate average of a B, and we look for a person with a graduate average, if he is taking graduate work, that out of four courses, he will have received three B's and one A.

Q. Do you know in what percentile of the class these people would be located in general? A. We seek to obtain people from the top ten per cent of the graduating classes.

Q. Do you require that the degree be held or sought in any particular field? A. The Bettis programs are only available in certain specific fields.

Q. Could you tell the jury what fields they are available in? A. Are you referring to the period back in 1960 and 1961?

Q. Yes, sir. A. At that time, the program was available only in the fields of mechanical, chemical, electrical
[228] and metallurgical engineering, and physics and mathematics.

Q. Now, as to the educational leave phase of this program, you have heard testimony that the purpose of that is to write a thesis. Is that correct? A. That is the purpose of the leave.

Q. Would you tell me if Westinghouse has any interest in these theses that are being written? A. Well, all these thesis topics are forwarded through my office, at which time they are given a review and forwarded to the Atomic Energy Commission for their review.

Q. What is the purpose of your review of these thesis topics? A. We seek to determine whether they are of general interest to the Bettis Laboratory in the Naval Reactors Work Program.

Q. Do you write a memorandum regarding the decision you make? A. There is a transmittal letter on each application for leave when it is transmitted to the Commis-

sion, which comments on the relevance of this thesis to the Work Program of the Laboratory. This became effective July 1, 1960.

Q. What is the Work Program in the Laboratory? A. It is in the field of nuclear engineering as related to the pressurized water reactor program of the Naval Reactors Program.

[229] Q. And, is it your testimony that all theses have to be in that same general area? A. We try to determine if there is a relationship, although it may be very general in nature. And, if so, we make a comment to that effect.

Q. Now, after you transmit your recommendation to the Atomic Energy Commission, do you receive anything back from them, as a reply, for instance? A. Yes. The man may not initiate his leave until we have a formal approval letter from the Atomic Energy Commission.

Q. Have any thesis been disapproved? A. Yes, they have.

Q. Now, sir, can you tell me if a participant in the Doctoral and Fellowship Program must be an employee of Westinghouse? A. He must be an employee of the Bettis Atomic Power Laboratory at Westinghouse.

Q. And, is this program open to all employees of the Bettis Atomic Power Laboratory? A. It is if they qualify under the conditions that I stated.

Q. How many people do qualify? A. Well, this would require a little bit of explanation. Because, we

[230] have a limited number of slots or positions available on this program each year, and we therefore are forced to impose a competitive type of condition where we may have many more people apply than what we can take because of our shortage of positions being available.

Q. And, what are your criteria once you do select? A. It is the ones which our selection committee feels are the most qualified. But, they must meet the minimum conditions first.

Q. Do participants in the program have any obligation to Westinghouse? A. Prior to July 1, 1960 each participant initiating leave was advised that he was expected to return

to the employ of Westinghouse for a period equivalent to the length of his full time leave.

Q. Did each one return? A. No.

Q. Some left? A. That is correct.

Q. How many? A. Five.

Q. And then, what did Westinghouse do if any-
[231] thing? Or, what did Bettis do? A. Well, as a result of subsequent negotiations between Westinghouse and the Atomic Energy Commission, the program was changed effective July 1, 1960. And, one of the changes was to institute a period of obligation which was effected by a two-year agreement in which they agreed to return to the employ of Westinghouse.

Q. Sir, can you tell us how the Committee decides how much of a stipend will be paid to the participants? A. The stipend is a fixed amount based upon the marital status and the salary of the employee.

Q. It is a percentage of what? A. Prior to July 1, 1960, it was a percentage of his gross salary.

Q. And, afterwards? A. It was an amount determined by the people who are responsible for the program in negotiations with the Atomic Energy Commission.

Q. Was it also based upon the marital status? A. Yes.

Q. And, dependency? A. Right.

Q. And, a percentage of salary? A. The percentage of salary clause was still used. It was still there
[232] technically, but it was never used because the man's salary was always in excess of that amount.

Q. What you did in effect, sir, was to limit the total, is that correct? A. That is correct.

Q. Now, sir, do you know if any other Westinghouse Company benefits are retained by employees while they are on educational leave? A. They receive—or are eligible for—all employee benefits that they had at the time that they initiated their leave.

Q. Could you describe some of those benefits? A. They retain their hospitalization and their pension plan privileges. They are eligible for vacation immediately upon return from their leave. And, they are eligible to participate in the stock option plan.

[234]

Mr. Arkin: Your Honor, we offer these into evidence, Defendant's Exhibits 6, 7, 8 and 9.

Mr. Larrimer: We object on the grounds that this stuff is completely irrelevant to the issue involved. He has already testified these people were eligible for these plans. What is the sense of having the plans themselves in? They don't mean anything. They don't add anything to the issue before the jury and the Court.

The Court: The objection is overruled. Let them be admitted.

[235]

Q. All right. Let us discuss the Plaintiffs individually. Do you know whether or not the Plaintiffs procured the approval of the Bettis Atomic Power Laboratory for these thesis proposals? A. Well, the procedure on the thesis proposals is the man submits an application for educational leave. And, on this application he has a description of his thesis proposal and also a cover memorandum which is signed by his major advisor and by the head of the department in which he is participating at the University.

This is forwarded to us to advise us that this topic, which is described in his application for leave, has the concurrence of the Department and they are willing for him to undertake this topic.

Upon our receipt of this, we add this as a part of a letter to the Atomic Energy Commission to obtain ap-

[236] proval of the funds for this man's specific leave.

Q. Now, when you say "Approval of the funds for this man's specific leave", would you explain that, sir? A. Well, this is part of our agreement with the Atomic Energy Commission, that prior to the initiation of a leave of any individual on the Fellowship Program, we must submit to them evidence that he has qualified—or that he is qualified—for this leave and he is in a position to utilize this leave and has a topic which he can pursue.

Upon their receipt of this, they will advise us of whether these funds will be approved for this purpose.

Q. Then, what you are saying is that there are three approvals; the department head at the University, your approval or your committee's approval, and the Atomic Energy Commission's approval? A. Yes. There are three steps in the chain.

Q. And, the funds come from the Atomic Energy Commission? A. A portion of the funds come from the Atomic Energy Commission. A majority of the funds do.

Q. What portion in 1961 was this? A. Well, there has been various revisions in the funding aspect of this program. And, each one of these men comes under a different set.

[237] Q. During the period in issue, during 1960 and 1961, do you remember what it was? A. Well, Mr. Wolfe's leave was supported entirely by the Atomic Energy Commission until July 1, 1960, After July 1, 1960, the Department of Defense came out with what is called the Armed Services Procurement Regulations which prevented the United States Navy from paying part of this cost, which they had shared with the Atomic Energy Commission at our site. And, therefore, Westinghouse picked up that portion.

For Mr. Johnson, the Atomic Energy Commission paid $420 a month of his leave, and Westinghouse paid $210 a month.

For Mr. Pomerantz, the AEC paid 84.23 per cent and Westinghouse paid 15.77 per cent during the majority of his leave.

Q. Now, sir, you have heard testimony regarding Plaintiffs' Exhibits 1 and 2, which are the statement of purpose and regulations of the Westinghouse Bettis Atomic Power Laboratory Doctoral and Fellowship Programs. Have you not heard such testimony? A. Yes.

Q. Do you as administrator adhere to those regulations? A. Yes, as nearly as possible.

[238] Q. Now, when you say "As nearly as possible", could you explain that? A. Well, the regulations are written as ideally as possible. We live in a world where things do not always work out to the Nth degree of the way we propose them.

Therefore, we try to administer the program as nearly to the regulations as possible. On occasions there have

been exceptions made because of the conditions that existed at that time.

Q. These regulations are really your constitution? A. That is right.

• • •

Cross-Examination

By Mr. Larrimer:

Q. There has been a lot of emphasis by Mr. Arkin on the fact that these benefits are available to employees. Nobody has really gotten into the idea of what is an employee, or who is an employee.

Would you consider that these Plaintiffs were employees of Westinghouse during their leave phase? A. Yes.

Q. And, what is your reason? A. Well, the income which they received and the manpower allocation which was charged against the budget in our department during this period of time.

[239] Q. You are talking about a bookkeeping entry? A. Well, it is more severe than that at our location.

Q. You are talking about an accounting entry of how their stipend was charged? A. Also at our laboratory there is a certain number of employees which we are allowed to have on the rolls at any one time. These individuals are counted against that number.

Q. And, you are talking about another self-imposed restriction at Westinghouse? A. That is correct.

Q. Notwithstanding, during this leave period nobody from your department ever attempted to control the activities of these men while they were on leave, isn't that true? A. Well, at the time they initiated their leave, it was initiated with the understanding that they were to participate in a certain activity at a certain location for a certain period of time.

Q. They were to study for their PhD degrees at the universities and to write a thesis, were they not? A. That is correct, on a subject which we had reviewed.

Q. And, they had to meet the requirements of the universities? A. That is correct.

Q. So, you would say then that all of these
[240] Plaintiffs—Pomerantz, Johnson and Wolfe—were at an educational institution during this leave period? A. They were in educational institutions.

Q. And, they received an amount of money from Westinghouse? A. They received an amount of money monthly from Westinghouse.

Q. Which was in the nature of a living allowance? A. Which was in the nature of a stipend, which was agreed to in advance.

Q. Which was in the nature of a living allowance? Isn't that in your regulations? A. The regulation says "Stipend".

• • •

[245]

• • •

ORVAL A. REDHAIR,

called as a witness in behalf of the Defendant and being duly sworn, testified as follows:

Direct Examination

By Mr. Arkin:

Q. Would you state your name? A. Orval A. Redhair.

Q. Mr. Redhair, did you come to this courtroom in response to a subpoena? A. Indirectly, I would say.

Q. Are you the custodian of the payroll records? A. I would say yes, at this laboratory.

Q. At the Westinghouse Bettis Atomic Power Laboratory? A. Right.

Q. Did you bring the records with you? A. I have the records for these three employees for the years 1960, 1961 and 1962.

Q. Are these the records? A. They are in that briefcase.

Q. Using the records to refresh your recollection, sir, can you tell me what account each Plaintiff was
[246] paid from prior to his educational leave? A. Prior to the educational leave of each employee, the employees were paid from the payroll account. And, such payments were charged to direct labor under the contract.

Q. Now, what does that mean, sir? Can you explain that? What is "direct labor under the contract"? A. In our accounting terminology, those charges to direct labor mean that the efforts were identified to a particular project or phase of the operation, and so identified as costs under the contract.

Q. Do I understand you to mean that this would be costs of a particular project? A. They would be costs of a particular project or that phase of the operation which is covered by a specific contract.

Q. Well, would you kindly illustrate what project you mean or what project we are talking about? A. Well, the individuals indicated, I believe, earlier in the record the effort and the type of work that they were doing. There is a particular directive under the contract for the efforts required on each of those types of work.

I am not familiar enough with the terminology of the technical efforts to be able from the records here to say exactly what the efforts were. But, in our [247] accounting terminology, we apply as first costs of an effort direct labor, material and indirect labor. They are your main components.

Q. Now, sir, what accounts were the participants paid from while they were on educational leave? A. While on educational leave, those payments are classified as indirect labor, or overhead.

* * *

Q. Now, explain to us what indirect labor means? [248] A. Indirect labor is absorbed in the cost of a project on a pro rata basis. The direct labor effort is recorded in hours and valued at the going rate and charged against the particular effort.

In addition to that direct labor, of course, there are direct materials and the supplies, and the indirect labor such as supervision, clerical efforts and maintenance or cost of operations.

Items of this nature are included in overhead and recovered on that basis.

Q. Is there an account number for a scholarship or fellowship? A. Not as such.

* * *

Q. Do you know, sir, if deductions were made from the Plaintiff's stipend checks? A. Yes, there were deductions made.

Q. What deductions, and for each particular Plaintiff? A. Well, in general, for all there were income tax deductions made and social security deductions.

And, there were deductions when authorized which were made for dependent coverage under the insurance plan and for a contributory portion of our pension plan.

[249] Q. That is in general. Can you give us a little more specific picture for each? A. I don't have the complete record for all of those items. The deductions for dependency coverage under the insurance plan and for a contributory portion of the pension plan are at the option of the employee and are made only when so authorized.

* * *

[250] Q. Did the Plaintiffs receive any salary increases while they were on educational leave? A. From the records I have here, Messrs. Johnson and Pomerantz had no change in salary while on stipend. There were minor adjustments in Mr. Wolfe's case. And, my recollection of that would be that the cost of living index changes were made quarterly at that time.

* * *

[251]

* * *

WILLIAM F. MAHER,

called as a witness in behalf of the Defendant and being duly sworn, testified as follows:

Direct Examination

By Mr. Arkin:

Q. Would you state your name? A. William Francis Maher.

[252] Q. Mr. Maher, did you come here in response to a subpoena? A. Yes, sir, I did.

Q. What is your occupation, sir? A. I am assistant manager of industrial relations for the Bettis Atomic Power Laboratory, Westinghouse Electric Corporation.

Q. As one of your duties, do you keep the personnel files of the Plaintiffs? A. Yes. They are under my jurisdiction.

• • •

[253]

• • •

Q. Well, when Dr. Pomerantz went on educational leave, did this affect in any way his seniority status or accrued service status? A. No, sir, not under the Fellowship Program.

Q. It did not affect it? A. No, sir.

Q. Can you tell me when Mr. Wolfe entered on duty? A. 8/20/52. That is August 20, 1952.

Q. Now, for the period while he was on educational leave, was there an adjustment made for his absence in terms of his seniority status? A. No, sir.

[254] Q. Can you tell me what date Mr. Johnson entered on duty? A. June 18, 1956. He was again a Westinghouse Electric Corporation graduate student. And, this is the corporation date. His accredited service date with the corporation dates from 6/18/56.

Now, he transferred to the Bettis Atomic Power Laboratory on July 2, 1956, according to his records.

Q. Now, again, sir, was there some change while he was absent on educational leave in his accredited service or seniority status? A. No, sir.

• • •

[255]

• • •

MARTIN A. DAUGHERTY,

called as a witness in behalf of the Defendant and being duly sworn, testified as follows:

Direct Examination

By Mr. Arkin:

Q. Would you state your name? A. Martin Aloysius Daugherty.

Q. Where do you live, Mr. Daugherty? A. 5435 Wolfe Drive, Pittsburgh 36.

Q. And, by whom are you employed, sir? A. United States Atomic Energy Commission at the Pittsburgh Naval Reactors Office.

Q. Could you tell us what your position is there? A. The title of the job is director, organizational personnel division.

Q. What does the title mean? A. Sometimes not very much. The functional duties ascribed to the job are that I am responsible to plan, direct and administer a program for the accomplishment of federal personnel programs, organization management, the administra-
[256] tion of contractor personnel activities, records management, communications, and several other house services.

With regard to the specifics here in the contractor personnel phase, I have the responsibility to administer the entire contractor personnel program to include the recruitment, training, job evaluation, staffing, et cetera.

Q. When you refer to "contractor personnel", to whom are you referring? A. The Westinghouse Electric Corporation at the Bettis Atomic Power Laboratory. Now, if I may take a minute to explain—

Q. Go ahead. A. The site of the Bettis Atomic Power Laboratory, for all practical purposes, is completely owned by the Government. That is, all the plant and equipment and facilities.

It is operated under a contract with the Atomic Energy Commission, and it is funded primarily through the Atomic Energy Commission's funds, although there are some navy dollars involved in it.

Q. Is what you are saying that the Government owns the plant and Westinghouse runs it? A. Yes, sir. It is commonly known as a Government-owned contractor-operated plant.

Q. Does Westinghouse, to your knowledge, do any other work besides work for the Government at
[257] this plant? A. To the best of my knowledge, no.

• • •

[258]

Q. Does Westinghouse make the expenditures first and then they are reimbursed, or do they seek prior approval? A. Well, it depends on the set of circumstances. It is not a simple proposition. There is some advance funding —for instance, in the banks—for the payroll. That is for that portion of it.

Primarily and basically, we follow a post-audit review, at which time adjustments are made to actual spending. There is further under the cost-type setup a provision where there is no risk to the contractor and a series of reviews are made, or proposals, for the contractor to perform certain actions. In certain instances of this kind, the contract in part requires a prior approval from the contracting officer.

Q. Can you tell me what sore of items require prior approval? A. Yes, sir, I can. And, may I use an example.

One contract article provides that any salary in excess of a certain amount shall be submitted to us on an individual basis for approval. And, we in turn then have to submit this to AEC headquarters.

[259] There is an approval requirement in this particular relationship. The individual young men, prior to their going on their doctoral leave or educational leave, must comply with this.

There are other approvals in there that vary considerably.

Q. You stated that each individual participant in the Doctoral Program had to have prior approval before he could go on educational leave? A. Yes, sir.

Q. Does that apply to the whole program? A. Well, the program is basically approved. Can I start at the beginning and explain this?

Q. Certainly. A. In the construction of the records, I was not here. I was employed at the Pittsburgh Reactors Office in 1958 in September.

The program was new to Westinghouse. It was submitted to the AEC for approval. And, the AEC did approve it, with limitations.

Then, one of the limitations was that when the individuals involved went on leave, that they would be approved on an individual basis by the Atomic Energy Commission.

[260]

Wednesday Morning,
November 23, 1966.
Jury Present.

[269]

Q. Now, I think, Mr. Daugherty, when we left off yesterday I had asked you a question. We talked about the Bettis Doctoral Program, and I think my question was what was the basis for the Atomic Energy Commission's approval of that program.

[270]

The Witness: May I refresh myself just a minute?

Q. Did you bring your personnel files with you? A. Yes, I have them. Excuse me a minute.

(Interval)

In 1955, there were discussions between the Atomic Energy Commission and Westinghouse, which led to such a program.

In mid-year—maybe in the fall of the year
[271] or late summer—Westinghouse advised the Atomic Energy Commission that such a program was in the offing, and laid out certain details of it.

Later in the year—I think toward the end of the year—Bettis specifically proposed the entire program and requested the Commission to reimburse the costs of the program.

Q. The program was then approved, was it? A. Generally, yes. There were some limitations on it.

Q. Now, is this program, the Doctoral Program at Bettis, in any way related to the Atomic Energy Commission's and the Bettis Laboratory's needs or work products?

[272]

The Witness: Well, the Bettis Laboratory's needs include a need for people—top technical people—capable of operating in complex nuclear technology.

This is part of the reason that the program was created. As Dr. Vogeley testified yesterday, I think it is pretty well established that the program was designed to attract people to the Bettis Laboratory and provide them with an educational opportunity leading to the PhD degree, and to eventually fill the needs for the top technical talent.

* * *

[273]

* * *

Q. Now, you stated that the program was approved by the Atomic Energy Commission. Can you tell me, sir, if you know whether or not the Atomic Energy Commission retained any control during the period in issue, which is 1960, 1961 and 1962, I believe, over specific theses topics chosen by the participants at the Westinghouse Bettis Atomic Power Laboratory? A. Yes, sir. Part of the approval requirement was that Westinghouse submit to the Atomic Energy Commission, prior to the individual going on his educational leave, a recommendation to us that dealt with the general application of the proposed thesis topic to the Bettis work.

Q. When you say "Bettis work", what specifically do you mean? A. Well, the work program, the purpose or the reason that Bettis is in existence. It would cover
[274] the scope of the work defined in the contract between AEC and Westinghouse.

Q. Do you know generally, sir, what the scope of that work is? A. Generally, yes.

Q. Could you tell us? A. It generally involves nuclear engineering, design research and development effort in the Naval Reactors Program, and certain central station reactors. That is, power stations.

Q. And, you testified that the thesis topic must be related to this work done at Bettis as a general rule? A. That is correct.

Q. Now, more specifically, have there been any high-level meetings at which you were present where this problem was discussed? A. Yes. In 1959, I met, together with a man named Richard March of the Atomic Energy Commission, with Westinghouse—and also present were Mr. Richard Cunningham, Mr. Van Horn and Mr. Qninn, who are present here—to discuss the relationship of the theses topics to the fields of work.

One of the specific reasons for doing this was that the Atomic Energy Commission has always believed that a man should have a job relatedness in his training
[275] assignments. And, I believe this is what Mr. Quinn brought out yesterday.

And, we discussed the fact that if a man is to be trained in a specialty, then that specialty should be related to his field of interest and his work assignment or future work assignment.

As I recall, we ended up in agreement on this.

Q. Now, when you review applications for educational leave, sir, is that one of the factors which you consider? A. Yes, sir, in its general application.

Q. Do you make a recommendation? A. Yes, sir. May I tell you the procedure we follow in our own organization?

Q. Certainly. A. The transmittal letter comes over addressed to the contracting officer, who is the manager of the Pittsburgh Naval Reactors Office, and it usually ends up with me.

I am then responsible to properly staff the proposal through our technical people and to arrive at a unanimous decision, and to make a recommendation and endorsement to the manager as to whether the leave should be approved.

Q. In the individual Plaintiffs' cases—and you heard the testimony that they did go on leave and that they did study in certain areas—are you in a position to state whether or not the AEC did approve those par-
[276] ticular Plaintiffs' leaves? Do you recall? A. I recall two of them, but I do not recall Mr. Wolfe, or Dr. Wolfe.

Q. Is it the general practice of your office to review each applicant? A. Yes, sir.

Q. Do you know that that is done? A. Yes, sir.

Q. Have you ever disapproved a thesis topic? A. Yes, sir. We have disapproved them, but we have not formally disapproved them. We have discussed the matter with Westinghouse, and the Bettis people were kind enough to withdraw that specific topic.

Q. Now, is the Doctoral Program reviewed in any way in general by you periodically? A. Yes, and others. Periodically we review it.

There is a requirement—an AEC requirement—that certain reports shall be submitted to headquarters. Bettis complies with this obligation, and we review those reports as they come in. As Dr. Vogeley testified, they are status reports.

In addition to that, we periodically review and evaluate the program. And, annually Bettis proposes a new class, a new number of people, a number of participants, and we try to match and relate the number of PhD's to [277] the Bettis work program and decide on the number of people and whether a new class should be approved.

Q. Do you know, sir, if there is a requirement at Bettis that a certain number of PhD personnel be hired? A. Not to my knowledge, no, sir.

Q. Is the number of PhD personnel at Bettis important in any way? A. You said the number?

Q. Well, in general, yes. A. Well, it is important to AEC's way of thinking that there is a number of PhD's at the Bettis Atomic Power Laboratory. It is certainly very desirable.

* * *

Q. Your statement was that it was important to the Atomic Energy Commission? A. Yes, sir.

Q. In what way? A. It is important to have top technical talent at the laboratory to successfully carry out the mission of the contract.

* * *

[284]

Q. Now, Mr. Daugherty, you have heard testimony, have you not, that two of the Plaintiffs were required to sign documents known as employment agreements? A. Yes, sir.

Q. This was prior to their taking of educational leave? A. Yes, sir.

Q. Do you know how long those agrreements have been a requirement? A. Since 1960.

* * *

Q. Did the Atomic Energy Commission require the formal written agreement?

* * *

The Witness: Yes, sir.

* * *

[285]

* * *

Q. Do you know, sir, if prior to 1960 there was an obligation of any kind to continue working in the employ of Bettis after completion of educational leave? A. Yes, sir. There was an obligation referred to sometimes as a moral obligation to return for one year after completion of the leave period.

* * *

[287]

* * *

Q. Mr. Daugherty, was this Doctoral Program, and specifically the studies of each individual in the Doctoral Program, incident to the contract work of the Westinghouse Bettis Atomic Power Laboratory?

* * *

The Witness: We considered it so, as an obligation to reimburse the costs as a personnel expenditure.

The Appendix A which references this specific program has a statement that to meet the contract needs
[288] there are certain educational programs included in it as a Fellowship Program.

* * *

Q. Now, Mr. Daugherty, if you know, will you tell us specifically whether or not the costs of research and development of Westinghouse are such "costs"? Do you understand me? A. No, I don't understand you, sir.

Q. I am referring to Article 10 of the contract which you are generally familiar with, are you not? A. Yes, sir.

Q. Now, to specifically tie this down, you have stated that the payments to the individuals under the Doctoral Program were incident to the contract, is that right? A. Yes, sir.

* * *

[289]

* * *

Q. You have testified, sir, that Westinghouse has specific contract commitments, is that right? A. Yes, sir.

Q. And, those contract commitments are for research and development into nuclear power projects? A. Gen-

erally in the Naval Nuclear Reactors Program, yes, sir.

Q. Now, the question I am trying to ask is if the payments to each individual recipient are directly attributable to the contract commitments of Westinghouse to

[290] the Atomic Energy Commission? A. There is an obligation in the commitment by the Government to reimburse Westinghouse for costs of its personnel expenditures. There is a further obligation and a commitment by the Government to reimburse to Westinghouse all costs that are reasonable and incurred necessary and incident to the work that is performed under the contract.

• • •

[291] Cross-Examination

By Mr. Larrimer:

• • •

[293]

• • •

Q. Now, one of the requirements, I believe you stated, was that the thesis topic be approved by AEC? A. Yes, sir.

Q. And, I think one of the reasons, is it not, is that the topic itself be publishable? In other words, it is not what we call classified information? A. Well, that is a second step. That didn't come into our consideration here on the approval, or on the approval requirements. What we wanted to assure ourselves of was that the training had general application to the laboratory's work effort.

Q. A general application? A. Yes, sir.

Q. Now, you are not an engineer, are you, Mr. Daugherty? A. No, sir.

Q. And, you can't give us any limitations on the use of the word "general application"? A. I don't understand you.

Q. Well, what I am asking you, is it not true that the thesis topic must be in an engineering field? A.

[294] Yes, sir, if the man is in the reactor engineering portion of it.

Q. And, isn't it true—if you know—that practically any additional information in the engineering field would be related to the work at Bettis?

• • •

[295]

Q. Well, I suppose since we have gotten into this area of what the contract between the Atomic Energy Commission and Westinghouse provides, and the categories of the costs, that I should ask you this question. Was the AEC aware of this program by which these men were securing these degrees? A. Yes, sir.

Q. And, did it approve of these, and of this program? A. Yes, sir.

Q. And, the AEC, of course, knew that these people secured a PhD degree from a university? A. Yes, sir. There is a requirement, as you mentioned earlier, that the approval be submitted to us, or requested of us, to go on the leave.

Q. And, your Commission also knew that during this leave of absence period that these men had no activities at all at your Bettis plant? I mean, no work activities? A. Yes, sir.

[296]

Q. You knew that this was a strict leave of absence and this stipend was paid to them during this period? A. As a leave of absence, yes.

Q. So that, there is nothing to indicate that anybody exceeded their authority? We are not trying to establish any excess of authority, are we? A. No, sir. The only thing I can recall, if I might add, sir, is that the reports that were submitted to Dr. Vogeley were status reports. Now, I don't know if that would have any bearing on your question as to work activities.

Redirect Examination

By Mr. Arkin:

Q. Mr. Daugherty, does anybody else review these leave applications besides yourself? A. Yes, sir. I testified that I staff them through our technical people.

[297]

JOHN R. VAN HORN,

called as a witness in behalf of the Defendant and being duly sworn, testified as follows:

Direct Examination

By Mr. Arkin:

Q. Mr. Van Horn, where do you live, sir? A. 5497 Library Road, Bethel Park, Pennsylvania.

Q. And, by whom are you employed? A. Westinghouse Electric Corporation.

* * *

Q. How long have you been employed by Westinghouse? A. I was first employed in 1950, in July. I continued in their employment until the end of 1961. And, I returned to Westinghouse in April of this year.

Q. What is your position? A. Administrator, engineering, training and development, training development department.

[298] Q. Is that the overall Westinghouse Electric Corporation? A. Yes, it is.

Q. Were you at any time more specifically involved in the Bettis Atomic Power Laboratory? A. Yes.

Q. When was that, sir? A. I was at the Bettis Atomic Power Laboratory from my initial employment in 1950 through May of 1961.

Q. What was your capacity or your occupation at Bettis? A. I was originally employed as assistant to the director of research, and subsequently assistant to the director of development.

And then, in the fall of 1954, I was staff assistant to the assistant to the division manager of the Atomic Power Division. I continued in that capacity until July of 1955, at which time I became director of education and training at Bettis.

Subsequently, I was made manager of education and training, which position I continued until I left Bettis in May of 1961.

Q. Now, as director and then manager of education and training, what did you do? A. Well, I had re-

[298] sponsibility for education and training programs, both technical and non-technical, involving West-

inghouse programs as well as programs associated with the universities.

More specifically, I had under my responsibility the Bettis Doctoral Fellowship Programs.

Q. Do you remember, sir, when the Bettis Doctoral Programs were established? A. Yes.

* * * *

Q. * * * at the time the Bettis Doctoral Programs
[300] were established, why were they established? A. Well, of course, at the time—and this was in the spring of 1955—I was staff assistant to the division manager's assistant, and the man to whom I reported was concerned with it.

Mr. Larrimer: This is hearsay evidence, and I object to it.

The Court: Doctor, if you know why the program was established, you may say. If you don't know, you may not say. Don't tell us what anybody told you.

The Witness: All right. The program was established because there was a need to attract qualified young graduates in engineering. And, this was an aid in attracting these individuals to come to the employment at Bettis and work in the work program.

Also, it was to upgrade their technical confidence so they would be able to perform at a high technical level.

By Mr. Arkin:

Q. Now, sir, do you know why it was necessary to bring young technical people to Bettis and upgrade their performance at this period? A. Well, the laboratory at that time had increased demands for people to fulfill the contractual requirements to the Atomic Energy Commission.

And, as far as the quality and numbers of people
[301] that could be attracted, it was felt that by offering such a program as this that we could augment the attractiveness and augment the numbers of people we could obtain.

Q. In other words, you felt you could bring people in with this program, is that right? A. That we might not otherwise be able to attract, yes.

Q. I see. And, you said there was an increased demand for people to augment contractual requirments to the

Atomic Energy Commission? Is that a fair statement of what you said? A. Yes, I think so.

Q. Were these contractual demands any different at that time than they had been previously? A. I don't know whether this question implies that I am familiar with the contractual demands or the details of the contract. If so, it would not be possible for me to testify on that matter.

Q. What I am asking you, sir, is do you know if or whether or not at that time there were more projects suddenly assigned to Bettis for which you had to find people to staff? A. Yes. As I recall, that was the case.

• • •

[302]

• • •

Q. Mr. Van Horn, do you know whether in fact your purpose was in fact accomplished? Did you attract personnel? A. Yes.

Q. Were you able to fulfill your Atomic Energy Commission requirements? A. Well, I don't know that I know all the requirements.

Q. Well, as best you can answer that? A. Through this program?

Q. Did this program aid you? A. It helped, yes.

[303] Q. Significantly, or not? A. Yes.

• • •

Cross-Examination

By Mr. Larrimer:

Q. Mr. Van Horn, then the primary purpose of this whole program was to attract personnel to Westinghouse at Bettis, is that true? A. I would certainly say that one of the objectives was to attract qualified individuals.

Q. You don't want to label it "primary", but that was one of the principal objectives? A. Yes.

Q. To attract personnel? A. Sure.

Q. Now, you have indicated, and you have attached the label to this program as "Attractive". How was this program attractive to people who would be in a position of the Plaintiffs? A. Well, I think it would be attractive, and it was attractive in the sense of providing an opportunity for them to attain additional education, which

would enable them to work at a higher level or at a more sophisticated level or technical level.

[304] They also would have the opportunity in their work experience with the laboratory to gain experience working with high-level people.

Q. But, the attractive feature of this was the educational benefit, is that right? A. The educational benefit and, I also might add, the opportunity to work in an interesting field with rather high-level competent individuals.

Q. I am talking about the Doctoral Program itself. I am not talking about the job that you hoped these men would take. It was strictly an educational opportunity that was the attraction, is that true? A. Well, I think that in our brochures and so on that were put out to attract these people, we also indicated not only the educational opportunities but also the opportunity to work in a new and exciting field with very competent technical people.

• • •

[305] Mr. Arkin: Now, Your Honor, comes now the Defendant at the close of the Defendant's case and renews its motion for a directed verdict—

• • •

Mr. Arkin: Let me, for purposes of the record, move for the directed verdict on the same grounds and for the same reasons which I moved at the close of the Plaintiffs' case.

The Court: All right. And, the motion is denied. The Court thinks the question is for the jury.

• • •

[312]

• • •

WILLIAM A. QUINN,

having been previously sworn as a witness, was recalled in behalf of the Plaintiffs and testified further as follows:

Direct Examination

By Mr. Larrimer:

Q. Mr. Quinn, I believe it was brought out on direct examination by the Government that you are familiar with

the payments made to these men during their
[313] leaves of absence? A. Yes, that is right.

Q. And, I believe you testified that Westinghouse withheld taxes? A. Yes.

Q. Commonly designated as withholding taxes? A. That is correct. They were withheld from the stipend payments.

Q. Now, during this same period, during the period that these men were on their respective leaves of absence, is it not true that Westinghouse also paid their tuition? A. That is correct. They paid the tuition and fees.

Q. And, the fees to the schools? A. The amounts were reimbursed to the individuals, not to the schools.

Q. These were paid to the individuals? A. That is correct.

Q. And, was withholding tax withheld from these amounts? A. No. The reimbursement was made in the form of cash through our petty cash fund.

Q. Very good. Now, this was all part of the Doctoral Program? A. That is correct.

• • •

[314]

Cross-Examination

By Mr. Arkin:

Q. Mr. Quinn, what you are saying is that there was a determination made by Westinghouse to withhold taxes on the stipends but not to withhold on the tuition payments? A. Yes. This determination was on the advice of our tax counsel.

• • •

[315]

• • •

RICHARD E. JOHNSON,

having been previously sworn, was recalled in behalf of the Plaintiffs and testified further as follows:

Redirect Examination

By Mr. Larrimer:

Q. Your project, Mr. Johnson, during your leave of absence was what? A. The study of the effect of hydrogen on the internal friction of zirconium metal.

Q. Well, you did not complete this project? A. I did not.

Q. And, did you continue in your employ at Westinghouse then after your leave of absence? A. Yes, sir.

Q. When did you leave Westinghouse? A. The spring of this year.

[316] Q. That would be 1966? A. Yes.

Q. And, to your knowledge, did Westinghouse after you had abandoned this project pick it up to try to get the answer that you were seeking? A. To the best of my knowledge, sir, neither the Bettis Laboratory nor any other branch or division of the Westinghouse Electric Corporation has pursued this subject. Nor, to the best of my knowledge, has anyone else in this country pursued this subject.

And, furthermore, may I say and may I go on the record as saying that it is my intention eventually to carry this experiment to a successful completion for its academic and scientific interest.

• • •

[317]

• • •

Mr. Arkin: Your Honor, now at the close of all the evidence, the Defendant renews its motion for a directed verdict on the same grounds as it stated in its motion at the close of the Plaintiffs' evidence and at the close of the Defendant's evidence.

• • •

[329]

• • •

The Court: Oh, I think that is very well demonstrated by the cases you cited—about ten of them in this country—where learned judges disagreed. There is no rule that I can put my finger on that would decide this case. People find facts differently where there is room for disagreement. And, obviously that is why the judges disagreed.

That is also why we must submit this case to the jury. There is a fact question here for the jury of whether this was a scholarship excludable from gross income or whether it was not.

• • •

[375]

The Court: Your brief argued that I should direct a verdict for the plaintiffs.

Mr. Larrimer: Well, I understand you cannot direct a verdict for the plaintiffs.

[377] Monday Morning, November 28, 1966.

[420] CHARGE OF THE COURT

The Court: Members of the jury, as you know, this lawsuit was brought by the Plaintiffs Doctors Johnson, Pomerantz and Wolfe and their wives to recover income taxes from the Defendant the Director of Internal Revenue, which taxes the Plaintiffs contend were illegally and erroneously assessed and collected by the Defendant on payments of money, or stipends, which they received from Westinghouse during the periods they were on educational leave from their employment with Westinghouse in order to pursue studies and research as candidates for degrees of Doctor of Philosophy.

[423]

In order to arrive at the truth, you must necessarily determine the facts and draw the reasonable and proper inferences from the testimony and the circumstances. This duty requires you to pass upon the credibility—that is the believability—of each witness.

You judge the credibility of a witness by the manner in which he gives testimony from the witness stand, his demeanor on the stand, the reasonableness or unreasonableness of his testimony, his means of knowledge about what he testifies, his interest in the outcome of the case if any, and any circumstances tending to shed light upon the truth or falsity of such testimony.

And, it is for you to say what weight you will give the testimony of each witness. Although you are to consider

only the evidence, you are not limited to accepting the bald statements of witnesses. On the contrary, you may draw from the facts you find proved such reasonable inferences as seem justified from the evidence in the lgiht of your own experiences.

In deciding what weight you will give the testimony of any witness, you may use that common sense, judgment and experience which you use in your everyday activities.

[424] Where facts are in dispute, it is your duty to reconcile the evidence if possible. If you cannot reconcile the evidence, it is your duty to determine which witnesses you will believe and where the truth lies.

There is very little evidence in dispute in this case. As I recall, the only major dispute involves whether or not the research projects undertaken by the Plaintiffs while on educational leave at the universities were services performed by the Plaintiffs for Westinghouse which were subject to the control and supervision of Westinghouse. The Plaintiffs want you to believe they were not; the Defendant wants you to believe they were.

Now, the pertinent provisions of the Internal Revenue Code—and this is only one of about ten books—provide as follows. This is known as Section 61. It defines gross income. A general definition of gross income is as follows.

Except as otherwise provided, gross income means all income from whatever source derived, including the following items; compensation for services like wages and salaries, other items like gross income from business, gains derived from dealings in property where you sell a house and you get a nice gain over what you paid for it, interest, rents, royalties, dividends, and many others.

[425] You will note that compensation for services —and that is payments for work done or services rendered—to a company are to be included in gross income. Under the law, such compensation must be reported in the taxpayer's income tax return as gross income, and income taxes paid thereon.

One of the important issues in this case is whether or not the stipend received by each Plaintiff from Westinghouse while on educational leave was compensation for employment services rendered to Westinghouse.

Now, the definition of gross income plainly indicates that there are exceptions to what is meant by "gross income". The definition states, "Except as otherwise provided".

Now, Section 117 of the Code specifies an exception. This exception is called a scholarship or fellowship grant. Scholarships or fellowship grants generally consist of money received by a student from some grantor to enable the student to pursue studies or research at a place of learning such as a university.

That money received by the student is not to be included in gross income. That money—or stipend as it has been called in this case—is excluded from gross income and need not be reported in the student's income tax return. Or, if it is reported, he need not pay a tax on it.

[426] If by chance income taxes are illegally and erroneously assessed and collected on that scholarship money, or stipend, the student is entitled to have the taxes so collected returned to him. We call that a refund.

The Plaintiffs are suing for refunds of the taxes assessed and collected on the stipends they received from Westinghouse while they were on educational leave. The Plaintiffs contend those taxes were illegally and erroneously assessed and collected on the stipends because the stipends were scholarships. The Defendant contends that the taxes were legally assessed and collected and should not be returned to the Plaintiffs.

Now, I shall read the pertinent parts of Section 117. Section 117 provides the general rule, in the case of an individual, gross income does not include, one, any amount received as a scholarship at an educational institution or as a fellowship grant.

A scholarship may be defined as follows. A scholarship generally means an amount paid or allowed to, or for the benefit of, a student, whether an undergraduate or graduate, to aid such individual in pursuing his studies.

The term includes the amount of tuition, matriculation and other fees which are furnished or remitted to a student to aid him in pursuing his studies.

The term also includes any amount received in the nature of a family allowance as a part of a scholarship.

[427] A fellowship grant may be defined as follows.

A fellowship grant generally means an amount paid or allowed to, or for the benefit of, an individual to aid him in the pursuit of study or research.

The term includes the amount of tuition, matriculation and other fees which are furnished or remitted to an individual to aid him in the pursuit of study or research.

The term also includes any amount received in the nature of a family allowance as a part of a fellowship grant.

Now, for the purposes of this case, a scholarship and a fellowship grant are substantially the same.

A candidate for a degree may be defined as follows. The term "Candidate for a degree" means an individual, whether an undergraduate or a graduate, who is pursuing studies or conducting research to meet the requirements for an academic or professional degree conferred by colleges or universities.

A student who receives a scholarship for study at a secondary school or other educational institution is considered to be a candidate for a degree.

The Plaintiffs Johnson, Pomerantz and Wolfe contend that the payments or stipends each received from Westinghouse while on educational leave at the University of Pittsburgs or Carnegie Institute of Technology were excludable from gross income because each received these

[428] amounts as a scholarship at an educational institution.

Therefore, the ultimate questions of fact which you are to decide from the evidence are, first, were the amounts received by Richard E. Johnson from Westinghouse a scholarship at an educational institution excludable from his gross income. And, you will answer the question yes or no.

The second question is the same; were the amounts received by Martin L. Pomerantz from Westinghouse a scholarship at an educational institution excludable from his gross income. And, you will answer yes or no.

Third, were the amounts received by Richard A. Wolfe from Westinghouse a scholarship at an educational institution excludable from his gross income. And, you will answer yes or no.

The question could just as well have read, was the stipend received by a Plaintiff a scholarship or a fellowship grant. But, as I have said, the words "amounts received" have the same meaning as "stipends received". And, the designation "scholarship" has the same meaning as "fellowship grant". Or, at least, it has substantially the same meaning.

You are instructed that amounts of money or stipends paid to an individual to enable him to pursue studies or research are considered to be amounts received as a scholarship or fellowship grant if the primary purpose of
[429] the studies or research is to further the education and training of the recipient in his individual capacity and the amount provided by the grantor for such purpose does not represent compensation or payment for employment services to the grantor or services under the grantors' direction or supervision.

If the primary purpose of the studies and research is to further the education and training of the recipient in his individual capacity, neither the fact that the recipient is required to furnish reports of his progress to the grantor nor the fact that the results of the study or research may be of some incidental benefit to the grantor shall of itself be considered to destroy the essential character of such amount or stipend as a scholarship or fellowship grant.

You are further instructed that, one, any amount of money paid to an individual to enable him to pursue studies or research, if such amount represents either compensation for past, present or future employment services, or represents payment for services which are subject to the direction or supervision of the grantor, then the amount paid to the individual is not a scholarship or fellowship under the tax laws.

Two, any amount of money paid to an individual to enable him to pursue studies or research which studies or research are primarily for the benefit of the
[430] grantor is not a scholarship under the tax laws.

[431] • • •

The evidence you should consider with respect to the nature of these payments the Plaintiffs received from Westinghouse to enable them to pursue their studies or research is the testimony relating to the basis of fixing the amounts

of the stipends which the Plaintiffs received while on leave.

There was testimony that the stipends were fixed on a percentage of their salaries plus adders for dependents, with a fixed maximum amount.

You should consider the evidence relating to the source of the money paid to the Plaintiffs while on leave.

You should consider the evidence relating to the coverage of Plaintiffs by Westinghouse employee plans for vacation, retirement, sick leave, stock options, and
[432] perhaps employee benefit plans while they were on leave, and evidence relating to their accredited service or seniority.

You should also consider the evidence that Westinghouse withheld income taxes and social security taxes from the stipends paid to the Plaintiffs during their leaves, and deducted from the stipends assessments for pensions and insurance when authorized by the employee.

In this connection, you should also consider the evidence that Westinghouse did not withhold income taxes or social security taxes from the tuition which Westinghouse paid to the Plaintiffs to enable them to attend the universities.

I am sure you all know that all universities require their students to pay tuition for their studies and research at the universities.

Were these payments compensation for services to Westinghouse or were they amounts received in the nature of a family allowance as part of a scholarship? The Plaintiffs contend they were part of a scholarship; the Defendant contends they were compensation.

With respect to the purpose of the studies and research, you should consider the evidence relating to the need of the Bettis Laboratory of Westinghouse for PhD personnel, or Doctor of Philosophy personnel.

You should consider the evidence that each Plaintiff spent his leave engaging in studies and research in
[433] laboratories at the universities, and prepared a thesis in order to secure a degree of Doctor of Philosophy. There was not evidence that any Plaintiff did any work or performed any duties at the Bettis Laboratory, or at any other Westinghouse plant, during his leave.

You should consider the evidence relating to the thesis topics which were undertaken and written; to whom the theses were submitted after they were written; the oral

presentation of the theses; and, where the oral presentations were made, who was present, who examined and questioned the Plaintiffs, who voted to accept the theses, where they were published, where they were kept, to whom they were available for reading, who benefitted from these theses, and other testimony in this respect.

Was the primary purpose of the studies and research to further each Plaintiff's training and education as an individual, or were the studies and research primarily for the benefit of Westinghouse?

With respect to whether Westinghouse or the universities had supervision and control of the research projects the Plaintiffs pursued while on educational leave, the Plaintiffs want you to believe from their evidence that the research projects they participated in at the universities were not under the control or supervision of Westinghouse,

[434] but were exclusively under the supervision and control of the universities and their respective faculty advisors. that Westinghouse imposed no restrictions on the universities or on the faculty advisors with respect to the research projects; and that the research projects the Plaintiffs engaged in while on leave were not services performed for Westinghouse.

On the other hand, the Defendant wants you to believe that the research projects engaged in by the Plaintiffs while on leave were services performed for Westinghouse and that those research projects and services were under the supervision and control of Westinghouse. On this issue of fact, you will have to determine which witnesses you will believe in the light of all the facts and circumstances in the case.

You should consider the evidence relating to how these topics were selected and who approved them. There was evidence that these topics were approved by the faculty advisors, by the university committees, by Westinghouse, and by the Atomic Energy Commission.

All these factors, and others that I may not have mentioned, should be considered by you in arriving at the facts. The weight to be given each factor is entirely for you.

Now, each Plaintiff wants you to believe that the primary purpose of his studies and research at the university while on leave from his employment with Westinghouse was to

further his education and training in his individual capacity.

In other words, each Plaintiff wants you to
[435] believe that the primary purpose of the studies or research was to benefit him in his personal status or character as an individual by additional education and training in order to obtain a degree of Doctor of Philosophy.

If you find this to be the fact by a fair preponderance of the evidence and the reasonable inferences to be drawn therefrom, then the amount or stipend paid to him by Westinghouse during his educational leave to pursue studies and research was received by him as a scholarship excludable from gross income.

In this connection, I instruct you that the fact that each Plaintiff was required to furnish progress reports to Westinghouse does not of itself destroy the essential character of the stipend as a scholarship.

And, I also instruct you that the fact that the results of a Plaintiff's studies or research may be of some incidental benefit to Westinghouse likewise of itself would not destroy the essential character of the stipend as a scholarship.

Thus, if you find the stipend received by a Plaintiff to be a scholarship excludable from gross income, the assessment of income tax on that stipend was illegal and erroneous, and such Plaintiff is entitled to a refund.

If you so find the facts, your answer to the appropriate question should be yes. On the other hand, if you
[436] find from the evidence and the reasonable inferences to be drawn therefrom that the studies and research pursued by a Plaintiff at Pitt or Tech were primarily for the benefit of Westinghouse, then in that event the amount or stipend paid to him is not an amount received as a scholarship.

If you find this to be the fact, then the assessment of income taxes on the stipend was legal and proper under the law and such Plaintiff is not entitled to a refund. Therefore you would answer the appropriate question no.

Also, if you find from the evidence and the reasonable inferences to be drawn therefrom, one, that the stipend paid to a Plaintiff to enable him to pursue his studies and research compensation for employment services performed by such Plaintiff for Westinghouse before the educational

leave began, or, two, if you find the stipend represents compensation for employment services performed by such Plaintiff for Westinghouse after the educational leave ended, or, three, if you find that the stipend represents compensation for employment services performed by said Plaintiff for Westinghouse while on educational leave, or, four, if the stipend represents payment for services performed by such Plaintiff for Westinghouse which were subject to the direction or supervision of Westinghouse, then any one of these findings will require you to conclude that the amounts of money or stipends so paid to

[437] a Plaintiff were not amounts received as a scholarship.

In short, if you find from the evidence that the stipend received by any Plaintiff from Westinghouse represents compensation for employment services rendered to Westinghouse or services subject to the direction and control of Westinghouse, then such Plaintiff is not entitled to a refund and you should answer the appropriate question no.

There can hardly be any doubt that the studies and research undertaken by the Plaintiffs at the universities were of some benefit to the Plaintiffs as well as to Westinghouse. So, you should carefully consider the words "primary" and "primarily" as used in these instructions.

"Primary" means fundamental, chief, or principal. "Primarily" means fundamental, chiefly, or principally. They mean of first importance, or they mean first in importance.

Was the primary purpose of the studies or research to further the education and training of the Plaintiffs as individuals? Was the primary purpose of the studies and research to further the Plaintiffs' education and training so that they could secure their degrees of Doctors of Philosophy?

Or, were the studies or research primarily for the benefit of Westinghouse? Was the additional education and training the Plaintiffs received and the theses topics and degrees of Doctor of Philosophy to be secured by

[438] them primarily for the benefit of Westinghouse?

The Defendant contends that the amounts or stipends paid to the Plaintiffs during their educational leave are not to be considered scholarships or fellowship grants. The Defendant contends that the Plaintiffs failed

to prove that the stipends they received were scholarships by a fair preponderance of the evidence.

The Defendant wants you to believe from the evidence and the reasonable inferences to be drawn therefrom that the stipends represent compensation for past, present or future employment services performed by Plaintiffs for Westinghouse, or that they represent payments for services performed by Plaintiffs for Westinghouse subject to the direction and supervision of Westinghouse.

Also, the Defendant wants you to believe from the evidence that the studies and research undertaken by the Plaintiffs were primarily for the benefit of Westinghouse.

The Defendant wants you to find the stipends paid to the Plaintiffs are not scholarships excludable from gross income, and therefore the income taxes paid by Plaintiffs on the stipends were legally and correctly assessed. In other words, the Defendant wants you to answer the questions no.

Each Plaintiff has the burden of proving by a fair preponderance of the evidence that his stipend was received by him as a scholarship excludable from gross
[439] income, and therefore the assessment of income taxes on his stipend is illegal and erroneous.

In other words, each Plaintiff has the burden of proving to you by a fair preponderance of the evidence that the primary purpose of his studies and research while on educational leave was to further his education and training and that his studies and research were not primarily for the benefit of Westinghouse.

Also, that the stipend received by him from Westinghouse to enable him to pursue his studies and research did not represent compensation for employment services to Westinghouse, or represent services which were subject to the direction or supervision of Westinghouse.

By a fair preponderance of the evidence, we mean by testimony which appears to you the jury to be more credible and probable—that is, more believable—than the evidence to the contrary.

A fair preponderance of the evidence means the greater weight of the evidence. It is not the greater amount nor the greater number of witnesses. It means that the greater weight, logic and persuasive nature of the believable and

credible evidence leads you to believe that a proposition is true.

By a fair preponderance of the evidence, we mean by such proof as satisfies the conscience and carries
[440] conviction to an intelligent, fair and impartial mind.

When a litigant has proved a fact by a fair preponderance of the evidence, it means that the jury is satisfied that the evidence tending to prove that fact is more probably true than the evidence to the contrary.

If after considering all the testimony and other evidence in the case you are not persuaded by either party, or if the evidence of both sides is of equal weight, then the disputed fact has not been proved by a fair preponderance of the evidence.

In that event, you should answer the questions submitted to you in the negative. In other words, if the Plaintiffs have failed to meet their burden of proof, then you should answer the questions no.

• • •

[441]

• • •

(The jury was withdrawn from the courtroom, and the following occurred out of their hearing.)

• • •

Mr. Larrimer: I would like to take a specific exception to the last comments on the burden of proof, tied in with the charge relating to credibility of witnesses, for the reason that there is no controverted fact in issue, and it is a matter of the jury finding certain facts or not which are material to the decision under the Court's charge.

In other words, I envision that the jury may be
[442] so confused—

The Court: That is very probable.

Mr. Larrimer: That it will ultimately end up to be that because they are confused the Plaintiffs lose.

The Court: That may very well be. The Plaintiffs wanted a jury trial. And, the Plaintiffs have had a jury trial.

I don't know what else I could say. I can see some merit in your objection.

Mr. Larrimer: Well, I—

Mr. Arkin: May I specifically answer that before he goes on?

The Court: Wait a minute. What else do you have?

Mr. Larrimer: Well, Your Honor, my objection is entirely to the fact that Your Honor has told the jury what the regulations are and you have incorporated in your charge both the Government's points or contentions and the Plaintiffs', and I submit it cannot be both. It is either one or the other.

And, I think that that is the confusion that has been created, because we haven't been able to agree on the tests to be applied by the jury.

And, I specifically then except to any charge relating to services subject to the supervision or control of the grantor for the reason that there is no evidence of
[443] services—

The Court: I couldn't see any myself, but they said that there was a package deal here. I am afraid to take it out without his consent. And, he wouldn't consent on Wednesday, so I left it in.

Mr. Larrimer: I make the further exception to the charge which points at one time in the charge to the issue being whether or not the primary purpose of the studies and research was to benefit the Plaintiffs in their individual capacities, or whether it represents compensation for services, past, present or future, or subject to the control and supervision of the grantor. For, I think that it is not necessary to exclude the latter—the compensation for services—in order for it to be considered a scholarship where the man is a candidate for a degree at an educational institution.

And, also for the further reason that there is no evidence that there were services rendered, past, present or future, or subject to the control and supervision of the grantor.

I also except to that portion of the charge which allows the jury to consider who derives the primary benefit from the research and study. There is no evidence that Westinghouse derived any benefit from this.

I specifically take exception to the charge of the Court that the jury may consider in this case the evi-
[444] dence relating to the manner in which the amount of the stipend was determined, the source of the

stipend, the consideration of the Plaintiffs as employees by Westinghouse, the withholding of tax by Westinghouse, or the needs of the Bettis Laboratory for personnel.

The reason I take this exception is I think it is totally irrelevant, and particularly so when the Court did not tell the members of the jury in what manner this could be relevant in arriving at a decision.

That is all.

The Court: As to your first point, you still didn't tell me what you think I ought to have said.

Mr. Larrimer: I don't remember now—oh, that was the burden of proof. Well, I think the burden of proof ties in with the contention—

In other words, I think if Your Honor feels that the Government's contention is right—if that is a contention that is adopted by the Court as the law in this case—then the jury should be told that if they find these facts exist and they are not controverted, then they should find for the Defendant.

The Court: Well, the inferences from the facts are strenuously controverted.

Mr. Larrimer: Well, I don't think—

The Court: Well, all right. I still don't know [445] what you want me to say.

Mr. Larrimer: What I would want you to say, Your Honor, is that the test is whether or not—and the reason I boil it down to this area is that this is the only possible fact which may be in issue—I would ask the Court to charge that the sole test is whether or not the studies and research were primarily for the benefit of the Plaintiffs in their individual capacities.

The Court: The rule doesn't say that. It says if the primary purpose of the studies or research is to further the education and training of the recipients in their individual capacities.

Mr. Larrimer: Yes, sir.

The Court: It doesn't say anything about benefit. But, go ahead.

Mr. Larrimer: Well, I would think that that is the test which Your Honor just stated, the primary purpose of the research and studies. And, whether or not there is a compensatory feature to the stipend is irrelevant.

• • •

[447]

* * *

(The jury retired for deliberation.)

* * *

[449]

* * *

(After due deliberation, the jury returned with answers to the interrogatories in the negative, which verdicts were read by the clerk.)

* * *

(Whereupon the hearing concluded.)

Plaintiff's Exhibit No. 2

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

December 4, 1957
(Revised Effective July 21, 1960)

WESTINGHOUSE BETTIS FELLOWSHIP AND DOCTORAL PROGRAMS

Statement of Purpose and General Regulations

I. GENERAL

A. *Purpose*

To provide advanced educational opportunities leading to the Doctor of Philosophy degree for exceptional graduates in engineering and science to aid in meeting the needs of Westinghouse for key professional personnel.

B. *Eligibility*

Participants in those programs are regular Westinghouse Bettis employes with all of those benefits and responsibilities which normally accrue to professional employes of the Westinghouse Bettis Atomic Power Laboratory. In every case, the individual should clearly understand that continuation in the program will depend upon a consistently high level of performance on both his work assignment and his academic program.

(Revised 7/21/60)

Each participant must maintain those contacts with his major advisor, his department head, and other university officials as may be required to make certain that he is pursuing an acceptable program of study in a satisfactory manner.

II. Rules and Regulations

A. *Work-Study Phase—Requirements and Conditions*

1. Throughout this phase of the program, at least once per semester, the participant will have personal interviews with the Administrator of Fellowship and Doctoral Programs, Bettis Education and Training, for the purpose of determining his continued eligibility in terms of his Bettis work assignment and his academic progress.

2. The participant has the responsibility of keeping his supervisor informed about his progress in the program.

3. Requirements to continue on the program:

a. During each fall and winter trimester or fall and spring semester a participant must complete at least six credits (or the equivalent in course units) in courses required in pursuit of the degree. A participant may also continue his academic progress during the spring trimester or the summer session by registering for three credits of required course work. Language courses for the purpose of determining the number of required course credits are excluded.

(Revised 7/21/60)

b. Participating universities set the minimum academic standards required of a candidate for a graduate degree. If a participant fails to meet these minimum standards, his fellowship will be withdrawn.

Apart from academic standards, the privilege of participating in a Bettis Fellowship or Doctoral Program calls for outstanding performance on the part of all participants. If a participant's quality point average falls below 3.25, his eligibility to continue as a Fellowshp participant will be reviewed by the Administrator of the

Fellowship and Doctoral Programs. The quality point average will be found under the following grade system:

A = 4 quality points
B = 3 quality points
C = 2 quality points
D = 1 quality point
F = 0 quality points

(Revised 7/21/60)

If a participant's cumulative quality point average remains below the 3.25 level for the 9 credits following the failure to meet the 3.25 quality point average, his fellowship or doctoral program will be withdrawn.

c. The failure of a required course will be sufficient cause for withdrawal of a participant's fellowship. If the failure is incurred by a participant otherwise in good standing, his fellowship will be suspended until the failed course is retaken and passed with an A or B grade; this honor grade must be earned the next time the course is offered (in any case within two years), and the course failed must be taken at the student's own expense. A participant will be eligible to apply for reimbursement under the Westinghouse Educational Assistance Program for courses taken, other than the failed course, during the period in which his fellowship is suspended.

d. Continued employment and a high level of job performance within the bounds of the work week are requirements for continuation of the program.

(Revised 7/21/60)

e. A participant may interrupt his program of study only in the case of a military leave of absence in accordance with Part II, Section A, Paragraphs 5 and 6.

(Added 7/21/60)

4. It is the responsibility of a participant to ascertain his eligibility to continue on the program. If he should register for courses while ineligible, he will not be reimbursed for any tuition, texts, or fees associated with these courses.

5. A participant going on military leave of absence is required to notify the Administrator of Fellowship and Doctoral Programs, Bettis Education and Training, at least ten days prior to beginning of the leave. If it is anticipated that a military leave of absence is to begin during an academic semester, the participant will not register for courses during that semester.

6. A participant on military leave of absence must apply to the Administrator of Fellowship and Doctoral Programs, Bettis Education and Training, for reinstatement of his fellowship at least four months prior to his separation from the armed services. If the participant was in good standing at the time of leaving for military service, the request for reinstatement may be granted provided the program still exists and funds are available.

7. A participant is expected to complete all courses for which he registers. When a participant finds it necessary to drop a course, he is expected to do so within that period in which the university reimburses the full tuition.

B. *Work-Study Phase—Remuneration and Reimbursement*

1. Subject to conditions and limitations set forth below in Section II, Part B, Paragraph 2, participants in these programs will be employed by the Bettis Atomic Power Laboratory on a 40 hours-per-week basis with release time of up to eight hours per week to attend required graduate courses.

(Revised 7/21/60)

2. When a participant's anticipated rate of release time exceeds 156 hours distributed over the fiscal year, those hours in excess of that rate will either be uncompensated or made up on a mutually agreed upon work schedule.

a. Each participant must submit a specific written request for release time to the Administrator of Fellowship and Doctoral Programs, Bettis Education and Training, at the time of registration. This request will be reviewed and the approved schedule will be forwarded to the participant's supervisor for his concurrence and information.

(Added 7/21/60)

b. When each semester or trimester release time schedule is approved, the Administrator of Fellowship and Doctoral Programs will inform the participant's supervisor of the number of release hours, if any, that exceed the maximum rate of 156 release hours per fiscal year. It is the responsibility of the participant's supervisor to determine whether the participant will make up those release hours in excess of 156 or whether the participant's salary will be reduced accordingly. The supervisor will take the appropriate administrative action and inform the Administrator of Fellowship and Doctoral Programs of the agreed upon work schedule.

3. When a participant is not attending required courses he is to assume the regular 40-hour work week schedule.

(Revised 7/21/60)

4. Participants may not be scheduled or compensated for overtime work while enrolled for course or thesis work during the work-study phase of the Fellowship and Doctorial Programs.

5. In addition to the specified salary and tuition remuneration, the Westinghouse Electric Corporation will reimburse Fellowship and Doctoral Program participants for fees and textbooks required of all students pursuing a program for an approved graduate degree. Participants will not be reimbursed for fines, deposits, and reference books or special fees.

The reimburseable fees for the MS degree are:

a. Laboratory fees

b. Thesis binding fees

c. Graduation fee

d. Rental fee for cap, gown, and hood

Refundable deposits such as the deposit for cap, gown, and hood will not be reimbursed.

Tuition for only six thesis credits will be reimbursed at the MS level.

6. Course credits or terms of residence beyond those normally required for the satisfaction of the requirements

for the Ph.D. degree will be reimbursed only upon the written recommendation of the participant's major advisor and with the concurrence of the Administrator of Fellowship and Doctoral Programs, Bettis Education and Training. In any case, reimbursement will be made only for courses taken for credit.

C. *Educational Leave Phase—Application and Approval*

1. The conditions of eligibility for continuing on the work-study phase of the Bettis Fellowship and Doctoral Programs are set forth in definite terms. However, successful candidates for the Educational Leave Phase of the Programs are selected from among applicants who have satisfactorily completed the work-study phase. Accordingly, if the number of candidates exceeds that for which financial support is available, a Fellowship Review Board will determine those who are to go on Educational Leave.

(Added 7/21/60)

2. Educational Leave will be granted for the specific purpose of completing the doctoral dissertation.

(Revised 7/21/60)

3. Each participant is urged to explore fully the possibility of conducting his doctoral dissertation in an area of technical interest to Bettis. In making his search for a desirable thesis topic, a participant is expected to consult with Bettis Laboratory technical supervisors for suggestions.

(Added 7/21/60)

4. To insure adequate time for planning and for gathering of the information required for obtaining approval of each participant's educational leave, the participant is responsible for notifying the Administrator of Fellowship and Doctoral Programs, Bettis Education and Training, of the proposed starting date of the participant's leave at least six months prior to that date.

(Revised 7/21/60)

5. Candidates, when qualified and ready for leave will make formal application for leave to Education and Train-

ing. The Educational leave Application forms, available in the office of the Administrator of Fellowship and Doctoral Programs, Bettis Education and Training, must be completed and submitted to that office at least three months prior to the proposed starting date.

(Revised 7/21/60)

6. To insure maximum benefits from his period of educational leave the participant should be prepared to show that he has:

a. Successfully completed all course requirements for the doctoral degree as specified by his department.

b. Successfully completed the comprehensive examinations required by his department and satisfied all requirements for admission to candidacy for the doctoral degree.

c. Selected a thesis topic with the concurrence of his major advisor and department head.

d. Available to him all facilities and equipment reasonably anticipated as necessary for the completion of the thesis.

7. A Fellowship Review Board consisting of the Executive Assistant to the General Manager, the Manager, Education and Training, and one or more members of senior Laboratory management will review the participant's application for Educational Leave taking into consideration the candidate's record, the needs of the Laboratory, and funds available.

(Added 7/21/60)

The Board may consult with technical supervisors and management and may interview the applicant as required to reach their decision which may be one of the following:

a. An educational leave may be approved, subject to A.E.C. approval.

b. A leave may be approved, subject to A.E.C. approval, but deferred until the next fiscal year.

c. The educational leave may be disapproved.

D. *Educational Leave Phase—Reimbursement and Conditions*

1. During the period of educational leave a participant in a Westinghouse Fellowship or Doctoral Program will receive an educational stipend. The stipend will be determined on the following basis:

a. A stipend of 70 per cent of the base salary and adders of a single participant with a maximum of $490 per month gross.

b. A stipend of 80 per cent of the base salary and adders of a married participant with a maximum of $560 per month gross.

(Revised 7/21/60)

c. A stipend of 85 per cent of the base salary and adders of a married participant with one child with a maximum of $595 per month gross.

d. A stipend of 90 per cent of the base salary and adders of a married participant with two or more children with a maximum of $630 per month gross.

2. For the purpose of the above calculations the base salary and marital status will be that of the participant at the time his leave is initiated. However, if a participant's status changes while on educational leave, he should apply to the Administrator of Fellowship and Doctoral Programs, Bettis Education and Training, for a change in stipend in keeping with his change in status. Salary changes accruing to all Westinghouse employees such as general wage increases will be reflected in a participant's stipend up to the maximum amount provided in Part II, Section D, Paragraph 1.

(Revised 7/21/60)

3. While on educational leave a participant will be reimbursed for tuition and fees normally required by the participant's school of candidates for a given degree. The reimburseable fees are:

(Revised 7/21/60)

a. Laboratory fees

b. Cost of publication of doctoral dissertation and abstract

c. Dissertation binding fees

d. Graduation fee

e. Rental fee for cap, gown, and hood

Cost of translations and textbooks and the typing and reproduction of the thesis are not reimburseable. Refundable deposits such as the deposit for cap, gown, and hood will also not be reimbursed.

(Revised 7/21/60)

4. Tuition of up to two and one-half terms of residence, if required, will be reimbursed after a participant has initiated educational leave at the University of Pittsburgh; tuition of up to two semesters on a full-time basis and 12 additional units, if required, will be reimbursed after a participant has initiated educational leave at the Carnegie Institute of Technology.

(Added 7/21/60)

5. Educational Leave will be granted for an academic year of nine months; however, upon request the leave period may be granted for a calendar year of twelve months with the stipulation that the stipend that would normally be received during a nine-month leave period be spread over the twelve month period. A participant initially selecting a nine month leave period may request a 3 month extension. Westinghouse may finance this extension by extending his stipend for 3 months on a loan basis at no interest. A participant utilizing the loan service must repay it, upon his return from leave, by authorizing payroll deduction at a minimum rate of $100 per month. When circumstances warrant, the Manager, Education and Training, may permit a participant who does not complete his dissertation within the formal leave period to continue work on his dissertation on a release-time basis for one additional trimester or semester.

(Added 7/21/60)

6. When a participant's major advisor recommends that an additional period beyond 12 months of full-time leave is necessary, a review will be made by the Fellowship Review Board, and a leave extension on a to-be-determined loan

or part-time work basis may be granted. In no case, however, may the total of all loans exceed the equivalent of three months' leave stipend computed at the monthly rate the participant would receive on a nine-month leave basis.

(Added 7/21/60)

7. Each participant initiating educational leave or an extension of leave on or after July 1, 1960 will sign an employment agreement with Westinghouse, at the time he applies for his educational leave, or extension of leave. Each participant will agree that after the end of his educational leave he will assume such duties commensurate with his education and experience as may be assigned to him by Westinghouse, and will thereafter continue in the employ of Westinghouse for at least two (2) calendar years from the date he assumes those duties at a rate of salary commensurate with the duties assigned.

(Revised 7/21/60)

E. *General Conditions*

1. All participants will be subject to Atomic Energy Commission, Navy or Department of Defense regulations or requirements with respect to Fellowship and Doctoral Programs which may come into effect.

2. The support of the Bettis Fellowship and Doctoral Programs must be on a year-to-year basis. While Westinghouse has every intention of continuing its support, circumstances beyond its control may alter the conditions of support in future years.

(Added 7/21/60)

3. The Manager, Bettis Education and Training, has the right to change with notice, or to waive any of these rules and regulations under circumstances which warrant such action.

Defendant's Exhibit No. I

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

EMPLOYMENT AGREEMENT

Agreement made this 30th day of October 1961, between Westinghouse Electric Corporation (hereinafter referred to as Westinghouse) and Mr. Martin L. Pomerantz (hereinafter referred to as Mr. Pomerantz).

It is agreed:

1. Westinghouse will reimburse Mr. Pomerantz for tuition and required fees while in attendance at University of Pittsburgh for the period from November 1, 1961 to July 31, 1962 under Westinghouse Bettis Atomic Power Laboratory Fellowship Program in Mechanical Engineering.

2. Westinghouse will pay Mr. Pomerantz the sum of $630.00 per month until the completion of the educational leave or until this Agreement is terminated, whichever occurs first.

3. After the end of the educational leave Mr. Pomerantz will assume such duties commensurate with his education and experience as may be assigned to him by Westinghouse, and will thereafter continue in the employ of Westinghouse for at least two (2) calendar years from the date he assumes those duties, at a rate of salary commensurate with the duties assigned.

This Agreement may be terminated by Westinghouse at any time by giving notice to Mr. Pomerantz of such termination. In the event of termination, for any reason, Westinghouse will have no liability hereunder to Mr. Pomerantz because of or after such termination.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals on the day first above written.

W. A. QUINN
Witness

ATTEST: ! ! ! ! !

MARTIN L. POMERANTZ

WESTINGHOUSE ELECTRIC CORPORATION

By: CLYDE E. VOGELEY

Defendant's Exhibit No. 3

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

EMPLOYMENT AGREEMENT

Agreement made this 16th day of September 1960, between Westinghouse Electric Corporation (hereinafter referred to as Westinghouse) and Mr. R. E. Johnson (hereinafter referred to as Mr. Johnson).

It is agreed:

1. Westinghouse will reimburse Mr. Johnson for tuition and required fees while in attendance at Carnegie Institute of Technology for the period from October 1, 1960 to June 30, 1961 under Westinghouse Bettis Atomic Power Laboratory Doctoral Program in Metallurgy.

2. Westinghouse will pay Mr. Johnson the sum of $630 per month until the completion of the educational leave or until this Agreement is terminated, whichever occurs first.

3. After the end of the educational leave Mr. Johnson will assume such duties commensurate with his education and experience as may be assigned to him by Westinghouse, and will thereafter continue in the employ of Westinghouse for at least two (2) calendar

years from the date he assumes those duties, at a rate of salary commensurate with the duties assigned.

This Agreement may be terminated by Westinghouse at any time by giving notice to Mr. Johnson of such termination. In the event of termination, for any reason, Westinghouse will have no liability hereunder to Mr. Johnson because of or after such termination.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals on the day first above written.

W. A. QUINN
Witness

ATTEST: J. EVANS

RICHARD EDWIN JOHNSON

WESTINGHOUSE ELECTRIC CORPORATION

By: JOHN R. VAN HORN

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 65-1033

RICHARD E. JOHNSON and BEVERLY P. JOHNSON, his wife, and MARTIN L. POMERANTZ and PHYLLIS L. POMERANTZ, his wife, and RICHARD A. WOLFE and ANNE F. WOLFE, his wife, *Plaintiffs*

v.

JOHN H. BINGLER, District Director of Internal Revenue, *Defendant*

Judgment

This case was called in open court on November 21, 1966 and there appeared James Larrimer, Esquire, for the plaintiffs and Michael B. Arkin, Esquire, for the defendant.

All parties announced ready and a jury was impaneled and sworn. Counsel for the parties stated the case, evi-

dence was introduced by the parties and the case was argued by counsel for the parties.

The Court instructed the jury as to the law; the jury retired to consider the evidence and returned with answers to special interrogatories as follows:

1. Were the amounts received by Richard E. Johnson from Westinghouse a scholarship at an educational institution excludable from his gross income?

ANSWER "YES" OR "NO" "No"

2. Were the amounts received by Martin L. Pomerantz from Westinghouse a scholarship at an educational institution excludable from his gross income?

ANSWER "YES" OR "NO" "No"

3. Were the amounts received by Richard A. Wolfe from Westinghouse a scholarship at an educational institution excludable from his gross income?

ANSWER "YES" OR "NO" "No"

In accordance therewith, it is hereby:

ORDERED, ADJUDGED and DECREED that plaintiffs' complaint be and the same is hereby dismissed with prejudice and judgment is hereby entered in favor of the defendant, together with costs to be awarded to the defendant.

/s/ RABE F. MARSH

Honorable Rabe F. Marsh
United States District Judge for the Western District of Pennsylvania

December 2nd, 1966

Certified from the record, Date 12-6-66, JAMES H. WALLACE, JR., Clerk.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

[Title omitted in Printing]

Motion for New Trial

AND NOW come the plaintiffs, by their counsel, and request the Court to set aside the verdict in favor of the defendant and the judgment entered thereon and to award a new trial for the following reasons:

1. The verdict is against the law.

2. The verdict is against the evidence.

3. The verdict is against the law and the evidence and the weight of the evidence.

4. Prejudicial error was committed by the admission into evidence of testimony relating to the benefit to be derived by Westinghouse and the Atomic Energy Commission from the overall scholarship program involved in the action, independent of the benefit which may have been derived, if any, from the specific research conducted by the individual plaintiffs.

5. Prejudicial error was committed by the admission into evidence of the accounting procedures utilized by Westinghouse in recording the stipends received by the plaintiffs.

6. Prejudicial error was committed by the admission into evidence of the fact that tax was withheld from the stipend.

7. Prejudicial error was commited by the admission into evidence of the testimony relating to the purpose of Westinghouse in initiating the scholarship program involved.

8. Prejudicial error was committed by the admission into evidence of testimony relating to the contractual relationship between Westinghouse Electric Corporation and the Atomic Energy Commission.

9. Prejudicial error was committed by the admission into evidence of the Westinghouse employee benefit plans, pension plan, profit-sharing, etc.

10. A new trial should be granted because the instructions of the Court to the jury were inadequate in the following respects:

A. The charge as a whole was inadequate since it did not clearly state to the jury what factual finding or findings were important in arriving at the verdict.

B. The charge of the Court was inadequate in that it did not state precisely the legal principles involved but rather adopted the contentions of both the plaintiffs and the defendant and told the jury to make its selection.

C. The charge of the Court was inadequate in that it directed the jury to consider the evidence relating to the basis for fixing the amount of the stipend, the source of the stipend, the consideration of the plaintiffs by Westinghouse as employees, the fact that withholding tax was withheld and the needs and requirements of Bettis Laboratory for personnel without further instructing the jury as to the relevancy of such evidence.

D. The charge of the Court was erroneous in that it charged on the matter of service rendered to Westinghouse or the Atomic Energy Commission by the plaintiffs during the educational leave period when there was no evidence that services were rendered.

E. The charge was erroneous in that it instructed the jury on the primary benefit derived by Westinghouse from the research conducted by the plaintiffs when there was no evidence that Westinghouse derived any benefit from the research.

F. The charge was erroneous in that it instructed the jury on compensation for past, present or future services when there was no evidence of such past, present or future services.

G. The charge was erroneous in that it instructed the jury in effect that the stipend could not be considered a scholarship if it was in effect compensatory to the plaintiffs.

H. The charge was erroneous in that it charged on services being subject to the supervision of the grantor

when there was no evidence that there were such services or that such services, if any, were subject to any supervision or control by the grantor.

11. The charge of the Court was inadequate and prejudicial to the plaintiff because of the fact that it was confusing to the jury, did not clearly state to the jury the legal principles involved in view of the fact that the basic facts were undenied, and in view of the fact that the closing statements of the charge reminded the jury of the burden of proof being on the plaintiffs.

12. The Court erred in not affirming the plaintiffs' points for charge, Nos. 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 19 and 20.

13. The error was committed in submitting the Interrogatories to the jury which suggested that there may be a scholarship at an educational institution which was not excludable from gross income.

14. The plaintiffs reserve the right to assign such further reasons for a new trial as may become apparent after the transcript of testimony becomes available for inspection.

DOUGHERTY, LARRIMER & LEE

By /s/ JAMES C. LARRIMER
Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 65-1033

RICHARD E. JOHNSON and BEVERLY P. JOHNSON, his wife, and MARTIN L. POMERANTZ and PHYLLIS L. POMERANTZ, his wife, and RICHARD A. WOLFE and ANNE F. WOLFE, his wife, *Plaintiffs*

vs.

JOHN H. BINGLER, District Director of Internal Revenue, *Defendant*

Opinion and Order

MARSH, *District Judge.*

In this action plaintiffs sue for the refund of income taxes alleged to have been erroneously assessed and collected from the plaintiffs for certain taxable years. Pretrial Stipulation, I.[1] Jurisdiction arises pursuant to Title 28 U.S.C.A. § 1340. The male plaintiffs (hereinafter plaintiffs) were employees of Westinghouse Electric Corporation (Westinghouse); each was granted educational leave to obtain a Ph.D. degree in mechanical engineering (Johnson) or metallurgical engineering (Pomerantz and Wolfe) at Carnegie Institute of Technology (Johnson and Wolfe) or the University of Pittsburgh (Pomerantz) pursuant to the Westinghouse Bettis Fellowship and Doctoral Program; each obtained a Ph.D degree and thereafter, in compliance with a written employment agreement with Westinghouse (Johnson and Pomerantz) or oral understanding (Wolfe), each continued in the employ of Westinghouse for at least the required length of time. Pretrial Stipulation, III, IV.

1

"Plaintiff	Amount	Year
Richard E. Johnson and	$395.00	1960
Beverly P. Johnson	599.82	1961
Martin L. Pomerantz and	276.68	1961
Phyllis L. Pomerantz	312.10	1962
Richard A. Wolfe and	985.31	1960
Anne F. Wolfe	362.24	1961"

The plaintiff wives were named only because there were joint income tax returns filed for the years involved. Pretrial Stipulation, III.

During plaintiffs' educational leaves Westinghouse paid their tuition at the educational institution and stipends based on a percentage of their base salaries plus family allowance. Westinghouse withheld and paid income tax on the stipends which are the amounts plaintiffs seek to have refunded.

A jury trial was held pursuant to the demand of the plaintiffs. The jury was asked with respect to each plaintiff:

> "Were the amounts received by [name of plaintiff] from Westinghouse a scholarship at an educational institution excludable from his gross income?"

Each question was answered in the negative. Plaintiffs ask for a new trial alleging errors in the admission of evidence and in the instructions. In our opinion a new trial should be denied.

Fellowships and scholarships are excluded from a taxpayer's gross income. Title 26 U.S.C.A., §§ 61(a), 117. The pertinent regulations provide:

> "§ 1.117-4 *Items Not Considered as Scholarships or Fellowship Grants.* The following payments or allowances shall not be considered to be amounts received as a scholarship or a fellowship grant for the purpose of section 117:
>
> "• • •
>
> "(c) *Amounts paid as compensation for services or primarily for the benefit of the grantor.*
>
> "(1) Except as provided in paragraph (a) of § 1.117-2, any amount paid or allowed to, or on behalf of, an individual to enable him to pursue studies or research, if such amount represents either compensation for past, present, or future employment services or represents payment for services which are subject to the direction or supervision of the grantor.
>
> "(2) Any amount paid or allowed to, or on behalf of, an individual to enable him to pursue studies or research primarily for the benefit of the grantor.
>
> "However, amounts paid or allowed to, or on behalf of, an individual to enable him to pursue studies or

> research are considered to be amounts received as a scholarship or fellowship grant for the purpose of section 117 if the primary purpose of the studies or research is to further the education and training of the recipient in his individual capacity and the amount provided by the grantor for such purpose does not represent compensation or payment for the services described in subparagraph (1) of this paragraph. Neither the fact that the recipient is required to furnish reports of his progress to the grantor, nor the fact that the results of his studies or research may be of some incidental benefit to the grantor shall, of itself, be considered to destroy the essential character of such amount as a scholarship or fellowship grant."

We think that the plaintiffs had the burden of proof. *Niles Bement Pond Co.* v. *United States*, 281 U.S. 357; *United States* v. *Rindskopf*, 105 U.S. 418; *United States* v. *Lease*, 346 F. 2d 696 (2d Cir.). Although for the most part the facts were undisputed, the reasonable inferences to be drawn therefrom were hotly contested. Those inferences and the ultimate fact embodied in the verdicts were for the determination of the jury. The items of evidence which plaintiffs contend were erroneously admitted, in our opinion were relevant to the underlying issues of fact imposed upon the fact finder by the quoted regulation. The instructions to which plaintiffs excepted were capably argued to the court at length by the expert counsel prior to their arguments to the jury and represent the distillation of counsels' views and the opinion of the court as to the law of the case. See: *Ussery* v. *United States*, 296 F. 2d 582 (5th Cir. 1961); *C.I.R.* v. *Ide*, 335 F. 2d 852 (3d Cir. 1964); *Stewart* v. *United States*, 363 F. 2d 355 (6th Cir. 1966); *Wells* v. *Commissioner*, 40 T.C. 40 (1963); *Woddail* v. *C.I.R.*, 321 F. 2d 721 (10th Cir. 1963); *Reiffen* v. *United States*, Court of Claims, filed February 2, 1967. The jury's attention was directed to the undisputed and disputed facts as they related to the law and as they applied to the theories advanced by each side. To the jury were submitted the determination of the verdicts and the all important inferences which could be reasonably drawn from the evidence. Those inferences, pro and con, were completely and fully argued to the jury by counsel. If, as plaintiffs so vigorously contend in their

brief, the evidence requires the entry of judgment notwithstanding the verdicts, they will have to persuade the reviewing court to make that decision, for although considerable merit is recognized in their arguments on the law, this court is not persuaded that the case as brought and tried did not present issues of fact for the jury.

An appropriate order will be entered.

Order of Court

AND NOW, to-wit, this 3rd day of July, 1967, after argument and upon due consideration of the briefs submitted, IT IS ORDERED, ADJUDGED AND DECREED that the plaintiffs' Motion for a New Trial be and the same hereby is denied.

(signed) RABE F. MARSH
United States District Judge

cc:

JAMES C. LARRIMER, ESQ., of
DOUGHERTY, LARRIMER & LEE
901 Grant Bldg.
Pittsburgh, Pa. 15219

MICHAEL B. ARKIN, *Attorney*
Department of Justice
Washington, D. C. 20530

UNITED STATES ATTORNEY
633 United States Courthouse
Pittsburgh, Pa. 15219

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 16826, 16827 & 16828

RICHARD E. JOHNSON and BEVERLY P. JOHNSON, his wife, and MARTIN L. POMERANTZ and PHYLLIS L. POMERANTZ, his wife, and RICHARD A. WOLFE and ANNE F. WOLFE, his wife

v.

JOHN H. BINGLER, District Director of Internal Revenue
RICHARD E. JOHNSON and BEVERLY P. JOHNSON, his wife,
Appellants in No. 16826

MARTIN L. POMERANTZ and PHYLLIS L. POMERANTZ, his wife,
Appellants in No. 16827

RICHARD A. WOLFE and ANNE F. WOLFE, his wife,
Appellants in No. 16828

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued January 18, 1968

Before HASTIE *Chief Judge*, GANEY, *Circuit Judge*, and WEINER, *District Judge*

Opinion of the Court

(Filed June 5, 1968)

By WEINER, *District Judge*

Before us on this appeal are three taxpayers[1] who, while employees of the Westinghouse Electric Corporation, were participants in the Westinghouse Bettis Fellowship and Doctoral Program through which each received a

---

[1] Appellants' wives are joined as nominal plaintiff-appellants by virtue of the joint income tax returns filed by them with their husbands for the years involved.

stipendiary grant and leave of absence from his employer in order to research, write and defend his Ph.D. thesis in engineering at either the University of Pittsburgh or Carnegie Institute of Technology (now Carnegie-Mellon University).

There was testimony below that the Bettis Atomic Power Laboratory, at which each taxpayer was employed before and after his academic leave of absence, is owned by the United States Government and is operated by Westinghouse under a "cost-plus" type of contract with the Atomic Energy Commission. Appellants' theses related to the work program of the Laboratory in the field of nuclear engineering.

Income tax was withheld from the monthly allowances received by each of the three appellants; each filed a claim for refund of this tax on the grounds that the grant was excludable from his gross income as a scholarship under Int. Rev. Code of 1954, § 117. These claims were rejected by the Internal Revenue Service, and again by a jury in the trial below.

The correctness of this determination is the subject of this appeal.

The crucial terms "scholarship" and "fellowship grant" appear in the revelant § 117 without any definition whatsoever.[2] In the absence of any guidance as to the content of these statutory concepts embodied in the Code itself, we agree with the Tax Court that

> "a proper reading of the statute requires that before the exclusion comes into play there must be a determination that the payment sought to be excluded has the normal characteristics associated with the term 'scholarship.'"

---

[2] In pertinent part, § 117(a)(1) provides as follows:

"(a) General rule.—In the case of an individual, gross income does not include—

(1) any amount received—

(A) as a scholarship at an educational institution (as defined in section 151(e)(4)), or

(B) as a fellowship grant . . ."

26 U.S.C. § 117(a)(1).

Elmer L. Reese, Jr., 45 T.C. 407, 413 (1966), *aff'd per curiam*, 373 F.2d 742 (4th Cir. 1967). Without attempting a comprehensive definition, we can simply mention some of the more salient "normal characteristics" of such scholarships or fellowship grants that are exemplified in the situation before us.

Appellants' stipends were awarded as subsidies to full-time students, in an amount bearing an appropriate relation to each recipient's needs. Their continuance was contingent upon the participant's maintenance of the academic standards required of a candidate for a graduate degree by the university which each appellant attended. While receiving these grants, appellants were on an academic leave of absence from their employment for the specific purpose of completing their doctoral dissertations. These are the most important positive characteristics which appellants' grants shared with scholarships generically. We turn now to the Code and the legislative history for an understanding of the distinctions with which Congress intentionally colored the kind of grant it wished excluded from gross income for internal revenue purposes.

Most notable in the legislative tax treatment of scholarships is that the Congress in 1954 was painting with a broad brush. Grants which properly qualify as scholarships are excluded from taxation in very unqualified terms by § 117(a). In the case of candidates for a degree, such as appellants before us, this exclusion is explicitly limited in the statute only as not applying

> "to that portion of any amount received which represents payment for teaching, research, or other services in the nature of part-time employment, required as a condition to receiving the scholarship or fellowship grant."

Int. Rev. Code of 1954, § 117(b)(1). The statute as it applies to degree candidates provides no ceiling for the amount that the candidate may exclude from his gross income, as long as it otherwise properly qualifies for scholarship tax treatment. This is in sharp contradistinction to the limit of $300 a month for a maximum of 36 months to which those not candidates for a degree are held. *Compare* § 117(b)(1) *with* § 117(b)(2)(B).

The legislative history also evinces unmistakably the intent of Congress to exclude from tax treatment qualifying scholarships without regard to whether they are to be considered "as income or as gifts," H.R. Rep. No. 1337, 83d Cong., 2d Sess. 15 (1954), as had been the test hitherto applied under the then "existing confusion," *id.*, for which the 1954 change was an attempted remedy. The Senate Report, furthermore, carefully sets out the sequence of the thinking that went into § 117:

> "The section first states the general rule that amounts received as scholarships or as fellowship grants are excludible from gross income and then prescribes specific rules for limiting the amounts which may be excluded."

S. Rep. No. 1622, 83d Cong., 2d Sess. 17 (1954).

In light of the statutory language and the reports of the Congressional committees which drafted it, the dominant legislative intent evident in the scheme of § 117 is that of encouraging financial aid to students at accredited schools, and especially to candidates for degrees, through the device of limited tax relief. The further attention given by both the statute and the legislative history[3] toward limiting the exclusion only for those *not* candidates for a degree would strengthen the inference, by the canon of statutory construction that *expressio unius est exclusio alterius*, that Congress intentionally included the sole restrictions it wished to place on the excludability of scholar-

---

[3] H.R. Rep. No. 1337, *supra* at 17 expressed concern, in the case of non-degree candidates, lest the exclusion extent to any annual grant which, together with "any compensation received from the recipient's previous employer," exceeded 75% "of the recipient's salary in the year preceding the grant." In taxing any amount above this limit, the House committee declared: "This will tax those grants which are in effect merely payments of a salary during a period while the recipient is on leave from his regular job." *Id.* For this percentage exclusion the Senate committee "substituted for the 75 percent rule an exclusion of $300 per month of grants paid to individuals who are not candidates for degrees." S. Rep. No. 1622, *supra* at 18. Both committees evidently foresaw the instant problem and legislated with respect to the type of student and the amount of stipend they wished to subject to a limitation on excludability.

ship stipends for degree candidates in the language of § 117(b)(1) itself.

To the sole qualification of § 117(b)(1), then, that degree candidates cannot exclude as tax-exempt scholarships any payment for services required as a condition of the grant, the Treasury Regulations purport to add two others. These would subject to taxation, in pertinent part, any stipend for studies or research which (1) "represents either compensation for past, present, or future employment services"; or which (2) subsidizes studies or research "primarily for the benefit of the grantor." Treas. Reg. 1.117-4(c)(1)-(2) (1956).

In light of the aim explicit in the legislative history of doing away with the touchstone of compensation versus gift, we cannot say, as one court has, that "indicia of compensation" such as are suggested by the regulation are legitimate criteria for testing the excludability of an alleged scholarship, *cf. Stewart* v. *United States,* 363 F.2d 355, 357 (6th Cir. 1966). Nor can we even approve the disqualification added by Treas. Reg. § 1.117-4(c)(1) (1956) of amounts which represent "compensation for past, present, or future employment services," without more. *Contra, Ussery* v. *United States,* 296 F.2d 582, 586-87 (5th Cir. 1961). This ruling seems merely an attempt to write into the regulations a concept which was considered and intentionally rejected by the Congress which enacted the Code.

To summarize: under a fair reading of the Internal Revenue Code of 1954, § 117, in the light of the Congressional committee reports which point up the thinking of the 1954 Congress, we believe that any reasonable stipend which comes within the common understanding of what constitutes a scholarship, is paid to finance the schooling of a degree candidate, and does not fall within the limitation of § 117(b)(1) is excluded from gross income. To illustrate the application of this general outline, we shall take up the Government's arguments in the discussion remaining.

The first element in the Westinghouse Fellowship Program that appears to trouble the Internal Revenue Service is the fact that each grant for those recipients on educational leave was based on a percentage of the

grantee's "base salary".[4] The basis on which each Westinghouse Fellowship grant was calculated was, however, not without some logic other than as what might arguably be a disguised salary payment. Scholarships are characteristically based at least partly on need, and the Westinghouse grants were calculated, perhaps generously, to give each recipient a living allowance based upon the size of his family and the standard of living to which his previous salary had accustomed him, without a sudden substantial cut in revenue. Monthly maxima were set; these ceilings do not appear to us to have been excessive or unreasonable —the one limitation most probably implicit in the otherwise unrestricted excludability of scholarships for degree candidates in § 117.

The concept and content of "scholarship" are developing ones. Fundamental in the exclusion afforded such stipends by § 117 is its encouragement toward graduate study. Without an arrangment of subsidies on a sliding scale based on prior income, employees such as appellants here would probably be hard pressed to leave work for a year to return to school to earn an advanced degree. We think the purpose of the instant fellowship program entirely consistent as concerns appellant degree candidates with the scheme of the exclusion afforded scholarships by the Internal Revenue Code of 1954, § 117. There is, moreover, as we have noted above, no ceiling to this exclusion in the statute.

Although the Senate report on § 117 did not discuss the problem of salary payments disguised as educational stipends for degree candidates, it did display concern for this problem with regard to postdoctoral students. In this connection, it notes: "Such grants may be in effect a continuing salary payment while the recipient is on leave from his regular job," S. Rep. No. 1622, *supra* at 18. The preventive response of Congress, however, was restricted to the $300 monthly limit of § 117(b)(2)(B) for nondegree candidates.

---

[4] Depending on the family status of the recipient, a Westinghouse Fellow received a stipend of 70% "of the base salary" plus "adders" up to a monthly maximum of $490 if single; 80% plus adders up to $560 monthly if married; 85% plus adders up to $595 monthly if married with one child; and 90% plus adders up to $630 if married with two or more children.

Hence the Westinghouse grants, even based as they were partly on a percentage of each recipient's prior earnings and partly on family size and need, do not seem to us for this reason to disqualify for exclusion either under the statutory language or because of any alleged failure to meet what we consider to be "the normal characteristics associated with the term 'scholarship'."

The second reason advanced by the Government for disqualifying these grants from nontaxable scholarship treatment is that the grantor, Westinghouse, in its own bookkeeping did not denominate them as such: it carried them, rather, as "indirect labor, or overhead." Deductions from the stipend checks, moreover, were regularly made for income tax and social security payments. An evident discrepancy exists between the characterization of these grants both by appellants and by the Fellowship prospectus as "stipends", on the one hand, and by the custodian of the payroll records at the Westinghouse Bettis Atomic Power Laboratory as "indirect labor", on the other.

The answer to this contention by the Government that the grantor's treatment controls, however, has already been given by this circuit in a similar case, where we recently had occasion to

> "observe and emphasize that under this regulation [§ 1.117-4(c)(2) (1956)] the determinative consideration is not the primary purpose of the grantor in subsidizing the student, but rather the primary purpose of and the primary benefit from the subsidized study."

Commissioner v. *Ide,* 335 F.2d 852, 855 (3d Cir. 1964) (Hastie, J.). Although the court in *Ide* was considering more particularly the taxability of the grants there in question on the grounds that the work done by the grantees was "primarily for the benefit of the grantor," in the words of Treas. Reg. § 1.117-4(c)(2) (1956); nonetheless we believe this observation equally valid as a caution against grafting an additional subjective test based on the grantor's intention onto the existing statutory language which was intended to obviate this inquiry. *Accord, Chandler P. Bhalla,* 35 T.C. 13, 17 (1960) (by implication), *acquiesced in,* 1965-1 Cum. Bull. 4.

The third element of this program to which the Internal Revenue Service objects is the commitment required by the

Westinghouse Bettis Fellowship and Doctoral Programs of each participating fellow:

> "that after the end of his educational leave he will assume such duties commensurate with his education and experience as may be assigned to him by Westinghouse, and will thereafter continue in the employ of Westinghouse for at least two (2) calndar years at a rate of salary commensurate with the duties assigned."

We do not agree with the Government that this commitment, in this case, is sufficient evidence that these stipends were of an essentially "compensatory nature". Compensation for the future "duties" of each grantee is to be at a "commensurate" salary, presumably without adjustment downwards to take account of the instant grant.

Assuming the above clause to be unenforceable by specific performance, we think it nonetheless apparent that contingent liability in damages for the breach of such a clause might be of substantial value in an appropriate factual situation. A significant commitment by the student in return for a grant would, of course, place that grant outside the category "scholarship", at least to the extent of the value of that commitment. For if the grantee had to barter for his stipend, giving full value for it, this arrangement would hardly serve the primary purpose of the § 117 exclusion: to encourage financial aid to education through tax relief.

In the instant situation, however, appellants' promise to return to employment with Westinghouse at an appropriate salary would subject them to no financial sacrifice. They are to be paid in accordance with their enhanced enducational qualifications. Since a salary commensurate to their new duties is already inducement for them to return to their employer-grantor, appellants' additional paper commitment seems of negligible value in this case.

We of course express no opinion as to cases where the quid pro quo given by the grantee for his grant is of measurable monetary value.

Viewed in a light most adverse to appellants, their situation is still akin to that in *Aileene Evans*, 34 T.C. 720 (1960), *acquiesced in*, 1965-1 Cum. Bull. 4. There the Tax Court held petitioner's stipend excludable from her gross income under § 117, even though she was obligated either

to work for her grantor after her studies or to refund the sums advanced. Although petitioner in *Evans* was not an employee of the grantor at the time she received her stipend, we do not deem this distinction material to the hypothetical question of compensation for future employment services.[5]

The last argument advanced by the Government is that appellant's studies were not primarily for the purpose of educating and training each recipient in his individual capacity, but rather in his capacity as an employee of the grantor. The grants, the Government argues, would hence be proscribed by Treas. Reg. § 1.117-4(c)(2) (1956).

To decide this issue, we do not have to consider the validity of this regulation in the light of the statutory language and legislative history of § 117. For the Government's argument is one step removed from the kind of situation the regulation would reach, even assuming it to be a proper construction of the statute. A stipend for studies or research has in the past been disqualified for scholarship treatment because a grantee has performed the function of a paid employee of the grantor, *e.g.*, *Ethel M. Bonn*, 34 T.C. 64 (1960); conversely, a stipend has qualified where a grantee's services "may supplement those of employees of the Institute [connected with the university grantor] but are of themselves not of primary or material benefit to the Institute . . . ." *Wrobleski* v. *Bingler*, 161 F. Supp. 901, 905 (W. D. Pa. 1958).

In the instant case, however, the Government contends that the grantee's research brings his stipend within the reach of Treas. Reg. § 1.117-4(c)(2) (1956), not because it was primarily of direct benefit to Westinghouse and not to the grantee, but rather because it primarily furthered the education and training of the recipient *qua* Westinghouse employee, and as a corollary redounded to the benefit of Westinghouse by enhancing its engineering program in the competitive market for recruits. Even assuming, arguendo, the truth of this contention and the validity of the touchstone of 'primary purpose', nevertheless such indirect advantage as is here alleged has been, and still is, beyond the scope of the regulation.

In summary, we think that the characteristics of what

---

[5] This we think is true on analysis, despite the cursory attempt to distinguish *Evans* on this point, in Rev. Rul. 65-146, 1965-1 Cum. Bull. 66.

constitutes a scholarship or fellowship grant for the purposes of the Internal Revenue Code are far from clear. The legislative and judicial gloss provides no sure elucidation, *cf. Reese, supra* at 412. *Compare, e.g., Woddail* v. *Commissioner,* 321 F.2d 721 (10th Cir. 1963) (resident physician receiving residence training in neurology and psychiatry; grant for instruction held taxable) *with Evans, supra* (registered nurse enrolled in psychiatric nursing program on stipend from Tennessee Department of Mental Health for which she will work or to which she will refund stipend; held not taxable).

To us, the nature of the grants here involved is not such as to deprive them of the normal characteristics associated with scholarships or fellowship grants. The single most important purpose that Congress had in mind in enacting § 117 appears through the language of the statute and the Congressional committee reports as that of encouraging financial aid to studies and research, with a preference for the work of degree candidates. In the light of this overriding Congressional goal of encouraging scholarship aid and the accompanying lack of restrictions as to its amount or character in the case of degree candidates, we believe, upon due consideration, that appellants' educational grants do qualify for income tax purposes as excludable scholarships or fellowship grants.

The facts of this case were not in dispute; no question of credibility was presented; no sufficient ground for inconsistent inference of fact was left. As our previous discussion indicates, this case turned on a question solely of statutory construction, requiring only judicial exegesis. Hence the issue below should not have been submitted to the jury, *see Jopek* v. *New York Central R.R.,* 353 F.2d 778, 783 (3d Cir. 1965); *Kocher* v. *Creston Transfer Co.,* 166 F.2d 680, 687 (3d Cir. 1948); *Joseph* v. *United Workers Ass'n,* 343 Pa. 636, 639 (1942).

The judgment of the district court will be reversed and the case remanded for proceedings not inconsistent with this opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 16,826 to 16,828

RICHARD E. JOHNSON and BEVERLY P. JOHNSON, his wife, and MARTIN L. POMERANTZ and PHYLLIS L. POMERANTZ, his wife, and RICHARD A. WOLFE and ANNE F. WOLFE, his wife

v.

JOHN H. BINGLER, Dist. Director of Internal Revenue

RICHARD E. JOHNSON and BEVERLY P. JOHNSON, his wife, Appellants in No. 16826

MARTIN L. POMERANTZ and PHYLLIS L. POMERANTZ, his wife, Appellants in No. 16827

RICHARD A. WOLFE and ANNE F. WOLFE, his wife, Appellants in No. 16828

(D. C. Civil Action No. 65-1033)

On Appeal From the United States District Court for the Western District of Pennsylvania

Present: HASTIE, *Chief Judge*, GANEY, *Circuit Judge*, and WEINER, *District Judge*.

Judgment

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed December 2, 1966, be, and the same is hereby reversed and the cause remanded for proceedings not inconsistent with the opinion of this Court.

ATTEST:

THOMAS F. QUINN
Clerk

June 5, 1968

SUPREME COURT OF THE UNITED STATES

No. 473, October Term, 1968

JOHN H. BINGLER, District Director of Internal Revenue,
Petitioner,

v.

RICHARD E. JOHNSON, ET AL.

Order Allowing Certiorari—Filed November 18, 1968.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE 1968—331-749/P.O. 450